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JURISPRUDENCE

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ABATEMENT. See **PRACTICE AND PLEADING.**

ACCORD AND SATISFACTION.

1. The settlement of cases by the parties is to be favored; and where such settlement has been fairly entered into, one party will not be assisted in withdrawing from it, or in re-opening the litigation. *Matthias v. Zearfoss*, 35.

ACCOUNTS. See **DECEDENTS' ESTATES.**

AFFIDAVIT OF DEFENSE.

1. Hops were shipped to defendants without a previous order. The defendants expressed surprise at the shipment, and notified the plaintiffs that they would inform them later whether they would keep them. To this the plaintiffs made no reply. In an action for the price—*Held*, 1st, the contract was, at the best, conditional; 2d, the defendants were entitled to a reasonable time in which to inspect and, if necessary, to test the hops; 3d, the hops having been kept six weeks, it was necessary for defendants to aver in their affidavit of defense not only that a test could not be made before, but also that a test or trial was necessary. *Boettner & Co. v. Stegmair & Sons*, 233.

2. An affidavit of defense, the averments of which are made upon "information and belief" simply without any allegation that such averments will be sustained by proof, is defective and insufficient. *Phillips v. Dryfoos*, 528.

ALIMONY. See **DIVORCE.**

AMICABLE ACTION. See **CONFESSION OF JUDGMENT.** **EQUITABLE EJECTMENT.**

AMENDMENT. See **PRACTICE AND PLEADING.**

1. After the statute of limitations has run the plaintiff will not be permitted "to shift his ground" or enlarge its surface by amendment. *Frauenthal v. Derr et al.*, 303.

ASSIGNMENT. See **SETOFF.**

1. An assignment in trust for certain specified creditors of the assignor inures to the benefit of all the creditors only where the assignor was, at the time, unable to pay all his debts. *Account of A. Bryden, Trustee*, 361.

2. The auditor found that at the time of the assignment, the assignor "had assets sufficient to have at once paid all her debts, and that these assets would have sold for cash for a sum sufficient to have paid all her liabilities in full."—*Held*, that the assignment was not on account of insolvency, and therefore did not inure to the benefit of all the creditors. *Id.*

ASSUMPSIT.

1. It was established that the Pittston Water Company furnished water to the hydrants of the borough, at the instance and request of the latter. *Held*, that the company was entitled to recover, not simply the actual cost of the water drawn by the borough from the hydrants, but a reasonable compensation, which would include the value of the water and the service in furnishing it to the hydrants ready for use for the purposes for which it was required. *Pittston Water Company v. Borough of Pittston*, 118.

2. Evidence that the water furnished was mixed with sand and other material destructive to the steamer, is relevant, inasmuch as it affects the compensation which, in equity and good conscience, the company was entitled to claim. *Id.*

ATTACHMENT AND ATTACHMENT EXECUTION. See **COURTS.**

1. The effect of a dissolution of an attachment by the court is not to abate the action, but to release the goods attached, if manual seizure of them has been made by the sheriff, and to discharge the lien if the property is not capable of manual seizure, or if by judicial sale a fund has been substituted in place of the property. *Goldstein et al. v. Sondheim*, 8.

2. It seems (but not decided) that the lien of an attachment, except as against other attachments, dates from the service of the writ, and not from its delivery to the sheriff. *Id.*

ATTACHMENT AND ATTACHMENT EXECUTION. (Continued.)

3. But if by the face of the return no goods have been seized, and the attachment has no lien, a rule to dissolve is inappropriate and entirely unnecessary. *Id.*
4. Where the defendant's affidavit is positive in its denial of the allegations of fraud contained in the plaintiff's affidavit, the burden of proof is cast on the plaintiff. *Terry v. Knott*, 121.
5. A fraudulent concealment of money is within the provisions of the act of 1869. *Id.*
6. An assignment and disposition of property intended to be effected for the purpose of defeating creditors by means of a sheriff's sale upon a fraudulent and collusive judgment, are within the meaning of the act. *Id.*
7. Goods in the hands of a sheriff by virtue of a *fi. fa.* are subject to attachment under the act of March 17, 1869. *Wisean et al. Appeal*, 154.
8. Where, upon a rule to dissolve an attachment issued under the act of 1869, the defendants, although called by the plaintiffs, testified voluntarily, their counsel being present at the first hearing and making no objection—*Held*, that their testimony was not incompetent, and should not be stricken out. *Miller et al. v. McCool et al.*, 209.
9. What is sufficient evidence that the defendants have disposed of their property with intent to defraud their creditors, and to sustain an attachment under the act of 1869, considered. *Id.*
10. A return to a writ of foreign attachment which does not show that the person summoned as garnishee (in case of attachment of real estate), was a tenant in possession holding under the defendant is fatally defective. *Fulk v. Wnaburger*, 211.
11. Where the return to a writ of foreign attachment shows a defective service, the proper practice is to move to set aside the "return," or the "service," or the "return and service," and not to move for a dissolution of the attachment. *Id.*
12. While courts are extremely liberal in opening judgments by default against garnishees, still, where there has been gross neglect, there should be evidence sufficient to satisfy the court that upon the trial no recovery ought to be had against the garnishee, or that the debt attached is not presently demandable. *Montayne v. Husted et al.*, 215.
13. The fact that the debt attached is not presently demandable will not prevent judgment against the garnishee, but the judgment should be moulded to conform to the terms of payment. *Id.*
14. In a proper case the court may control the execution, even after judgment, so as to prevent enforcement of the debt attached until it is demandable. *Id.*
15. Proceedings were begun in New York for the dissolution of a corporation of that state on account of its insolvency. At the same time a temporary receiver was appointed with all the powers of a permanent receiver, and an injunction was issued. The plaintiff was then a citizen of New York and a director and general agent of the company, and had notice of the proceedings. Between that time and the final dissolution of the company he took up his residence in this state. After the final dissolution of the company he issued a foreign attachment—*Held*, 1st the plaintiff being bound by the appointment of the temporary receiver in New York, other states, upon principles of comity, will give full force and effect thereto. *Hintermeister v. The Ithaca Organ and Piano Company*, 403.
16. There was no authority for commencing a suit against a receiver for a debt of an insolvent corporation of New York after a complete dissolution. Hence, the receiver cannot be added as a defendant by the plaintiff under the power to amend. *Id.*
17. The court may in a summary way inquire into its jurisdiction to issue the writ and as to the liability of the defendant or of the property to foreign attachment and dissolve the writ. *Id.*
18. Rule as to the recognition to be given to foreign receiver considered. *Id.*
19. Cases collected as to the power of the court to dissolve foreign attachments and practice considered. *Id.*

ATTORNEY AND CLIENT. See DECEDENT'S ESTATES. TRUSTEES.

1. Where a discontinuance is entered by an attorney pursuant to, though some time subsequent to, a written agreement settling the case, the court ought not to disturb it without the most convincing proof of a revocation of the attorney's power, or some evidence, at least, impeaching the fairness or validity of the settlement. *Matthias v. Zearfoss*, 35.
2. In proceedings against a member of the bar for misbehavior or misconduct in office as an attorney, the fact that the charges preferred are criminal in their character, does not make it necessary for the court to await the result of a trial in the Quarter Sessions, before proceeding to disbar or suspend. *In Re Gates*, 373.

ATTORNEY AND CLIENT. (Continued.)

3. The statutes and the adjudicated cases show that an attorney at law is an *officer of the court*, and that for misconduct or misbehavior in office, he may be suspended from practice, or stricken from the rolls. *Id.*

4. The records of our courts are judicial memorials of the highest character, and are to be sacredly guarded by the officers of the court, as well as by the officials having them in their special charge. *Id.*

5. The relations of attorneys to the court and to the client, and their obligations in these relations, considered and discussed. *Id.*

6. A Court of Common Pleas has authority, without a trial by jury, to suspend from practice an attorney guilty of the offense of abstracting a part of the records of the court in the interest of his client, although this is by statute a criminal offense. *Id.*, 448.

ATTORNEYS—*LIST OF*, 360.

AUDITOR.

1. An auditor may distribute a fund to an attaching creditor under the act, without suspending proceedings, until the creditor's claim is reduced to judgment. *Wiseman et al. Appeal*, 154.

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BOROUGHES.

1. Where adjacent territory is admitted into a borough by the borough authorities under section 30 of the act of 1851, and no appeal is taken under section 4 of the act of 1871, the annexation becomes complete upon the expiration of the time allowed for appeal, without confirmation by the court or approval by the grand jury. *In Re Borough of Pittston, 167.*
2. Under the general borough law of April 3, 1851, a burgess of a borough has no jurisdiction as an inferior court to adjudge civil causes. He is not the official to hear and determine suits for fines and penalties imposed for violations of the borough ordinances. *Commonwealth v. Thompson, 424.*

BUILDING ASSOCIATION.

1. Payments upon building association stock are not *ipse facto* payments upon the judgment debt or loan. In order to effectuate such application an election by some party entitled to make it is required. *Treffleisen Assignment, 205.*

CAPIAS.

1. A *capias* issued against a married woman may be amended by the addition of the name of her husband. *Smith v. Smith, 127.*
2. Her privilege from arrest is not ground for quashing the writ. *Id.*
3. If the affidavit upon which a *capias* in slander issues is insufficient, the proper practice is to discharge the defendant without bail, but not to quash the writ. *Id.*

CASE STATED. See ERRORS AND APPEALS.

1. In a case stated the court cannot be called upon to find the facts from the evidence, nor to pass upon the sufficiency of the reasons upon which the parties may base their admissions, whether such reasons are stated or not. *Glennon v. County of Luzerne, 77.*
2. The case stated admitted that when the plaintiff entered on his official duties as recorder (1884) the population of the county was over one hundred and fifty thousand, notwithstanding the census of 1880 showed a less population. *Held*, that, on the admitted facts, the plaintiff is to be compensated according to the act of 1876; also, that the effect of the admission was not destroyed by the subsequent statement of the reasons upon which it was based. *Id.*

CENSUS.

1. The census of 1880 showing that the county of Luzerne contained less than one hundred and fifty thousand inhabitants (sec. 2 of the act of May 11, 1881, P. L. 22), did not prevent the act of June 22, 1883, P. L. 139, from going into effect as to said county. *Glennon v. County of Luzerne, 77.*
2. Whenever an effort is made to apply the act of March 31, 1876 (salaries), to an officer of any particular county, the fact to be ascertained is, whether the county contained sufficient population at the time the officer entered on the duties of his office. *Id.*
3. Whatever the population may previously have been, or what it may hereafter become, does not control the case. *Id.*
4. The rule announced by Rice, P. J., in 1 Kulp, 297, adopted by the Supreme Court, viz: In the absence of express legislative declaration of the fact, or of any other method provided by the legislature for ascertaining it, the last preceding decennial census is to be resorted to as the best evidence of the population of a county in case of classification by population. *Monroe v. Luzerne County, 7 Out. 281, modified. County of Luzerne v. Glennon, 189.*

CENSUS. (Continued.)

5. Each county must remain in the class in which the last census found it until it is transferred to another class by a subsequent census. *Id.*

CERTIORARI. See WARRANT OF ARREST.

1. Where it is sought to overturn an old judgment by evidence contradicting the constable's return, the clearest and most satisfactory is required. *Crevelling et al. v. Kindig*, 11.

2. Where the want of jurisdiction does not appear on the face of the record, and the defendant has been duly served with process and has knowledge of the judgment, the certiorari must be sued out within twenty days. *Id.*

3. Not so, where it appears on the face of the record that the justice did not have jurisdiction. *Id.*

4. It appeared by uncontradicted evidence that after the rendition of judgment a material and apparently unauthorized alteration was made in the constable's return. Held, that this destroyed its conclusiveness as evidence of the manner of service, and that, consequently, evidence as to the actual mode of service was competent for the purpose of showing that the justice did not have jurisdiction of the defendant in fact or by legal presumption. *Fidelity Casualty Company v. Ketrick et ux.*, 31.

5. General rule as to admission of evidence to impeach the record of a justice of the peace on certiorari considered. *Id.*

6. Where the alderman had jurisdiction of the cause of action his decision as to the liability of the defendant cannot be reversed on certiorari by referring to the testimony taken before him; for, although sent up by him, it is not part of the record. *Jenkins v. Jenkins*, 39.

7. Upon certiorari a record will not be reversed for a false return of service, unless the falsity be made to appear very clearly by depositions. *Watson et al. v. Timlin*, 218.

8. The return under oath need not be by affidavit on the back of the summons. *Id.*

9. Enough must appear on the record of the justice to show a cause of action within his jurisdiction. *Baah v. Brader*, 252.

10. Where the justice has jurisdiction of the case a certiorari issued more than twenty days after judgment is too late. Depositions showing error in the method of exercising the jurisdiction, will not alter the application of the twenty day rule. *Tully et ux. v. Williamson et al.*, 318.

11. Where there has been personal service of summons, a variance as to the name of the plaintiff between the summons and the transcript of the docket entries does not constitute one of those jurisdictional defects which will avail to overturn the judgment after the time for suing out the writ of certiorari has expired. *Peters v. Susquehanna Fire Insurance Company*, 423.

12. It is not essential to state the hour, where the record shows that the parties appeared on the return day and went to trial, and that judgment was rendered publicly. *Storrey v. McGlynn*, 444.

13. It is not to be presumed that the justice acted fraudulently or corruptly from the mere excessiveness of the damages awarded. *Parreño et al. v. Nichols et ux.*, 445.

14. The fact that the record was not sent up on or before the return day of the writ does not warrant a dismissal of the certiorari. *Id.*

15. Where a plaintiff in error takes no steps within ten days after the return day of the writ to compel a return of the record, the defendant in error is entitled to a dismissal of the writ as of course. But a motion to dismiss the writ because of non-compliance with the above rule of court comes too late after the proceedings have been returned. *Id.*

16. The original writ must be delivered to the justice. Service by copy is irregular and defective, and he cannot be attached for disregarding it. *Id.*

17. But where service, although irregular and defective, has been made within five days after the writ issued, and, notwithstanding the irregularity, the justice sends up his proceedings, and makes return to the original before motion to dismiss, the court will review the proceedings as if the writ had been regularly served. *Id.*

18. Where the justice renders judgment by default, the hour as well as the day should be stated on the record. *Id.*

19. On the reversal of the judgment of a justice of the peace on certiorari, an execution cannot issue for costs. *Boston v. McDaniels*, 515.

20. A certiorari is a substitute for a writ of error, and no point can be raised by it which is not apparent on the face of the proceedings. Depositions and parol proof are only admissible to show want of jurisdiction, or fraud or corruption on the part of the magistrate. *Luke v. Schlager*, 305.

CERTIORARI (Continued.)

21. Upon *certiorari* all the proceedings of the magistrate, as they appear of record, are to be taken as true. *Id.*
22. The rule that where judgment of a justice is entered by default the hour must be stated does not apply where the record shows that the parties appeared at the hearing. *Noble v. Scranton Glass Company, 514.*
23. A summons from a justice need not be served on an "adult" member of the family. *Schilke et al. v. Meyer, 524.*
24. In an action before a justice of the peace to recover back taxes paid to a collector under threat of distress, the statement of the plaintiff's demand ought to be so certain and definite as to show a legal cause of action within the jurisdiction of the justice, without the necessity of resorting to presumptions. *Miller et al. v. Lowenstein, 527.*

COMITY. See CORPORATION. RECEIVER.

CONFESSION OF JUDGMENT. See STATUTE OF LIMITATIONS.

1. Where judgment is entered on a confession more than ten years old contained in an amicable action of ejectment, leave of court, based on affidavit, must be obtained as required in Rule XVIII., otherwise the judgment will be stricken off. *Lanning v. Davies, 217.*
2. Effect of delay in moving to open a confessed judgment procured by fraud or duress considered. *Lord v. Breese et al., 253.*
3. A judgment note given by a married woman, although she has been declared a *feme sole* trader, is null and void, and will not justify an execution against her property. *Rabe v. Barber, 457.*

CONFLICT OF LAWS.

1. The coverture of the defendant in an action upon her personal undertaking (according to the law of the state of Virginia), is not a fact affecting the jurisdiction of the court, and hence in a suit in this state upon a judgment obtained in the Virginia court the evidence of that fact is incompetent and irrelevant. *Tuggle v. Leath et ux., 41.*

CONSTABLE. See CORONER.

CONTRACTS.

1. When an act or contract is prohibited under a penalty, such act or contract will be unlawful and void, although the statute imposing the penalty does not expressly so declare. *Atherton et al. v. City of Wilkes-Barre, 331.*
2. Where a contract is only voidable or relatively void on the ground of fraud or duress practiced on the party, it may be ratified or affirmed. *Lord v. Breese, et al., 253.*
3. "He who knowingly accepts and retains benefits under such a contract, or who uses the property acquired as his own, after the discovery of the fraud, or unduly delays claiming back his property or giving up what he received, affirms the validity of the contract." *Negley v. Lindsay, 17 Sm. 227, followed. Id.*

CORONER. See JUSTICE OF THE PEACE.

1. It is the duty of coroners to hold inquest, *super visum corporis*, only where there are suspicious circumstances surrounding the death, indicating that it was caused feloniously or in a violent or unnatural manner. Where death results from natural causes as by a stroke of lightning, a fit of epilepsy, apoplexy, or a fall induced by drunkenness, there should be no inquest. *In Re Coroner's Inquests, 427.*
2. The coroner is the judge of the necessity for an inquest, and it will be presumed that he acted in good faith, and his costs will be allowed until the contrary is shown. *Id.*
3. Coroners' jurors are entitled to one dollar per day where the time employed does not exceed six hours, and one dollar and fifty cents per day where it exceeds that amount; and the time should appear by the return of the inquest. They are entitled to no mileage or traveling expenses. *Id.*
4. A constable is not entitled to fees from the county for summoning a coroner's jury. The coroner must summon his own jury or pay for it himself. *Id.*
5. Witnesses before a coroner's jury are entitled to no fees or traveling expenses. *Id.*
6. The county is liable for the services of a physician, called in by the coroner to make a *post mortem* examination, but not for the services of two physicians. *Id.*
7. The testimony taken before the coroner should not be returned with the inquest. *Id.*

CORPORATION. See WAGES.

1. Where the by-laws of a corporation provide for the election of a board of directors, seven in number, upon a day certain, the failure to choose a full board, because of a tie vote as to three candidates, will not vitiate the election of those who received a clear plurality of the votes cast. *Commonwealth ex rel. v. Parrish et al.*, 15.

2. In such a case the corporation may proceed to fill the vacancies caused by the tie votes at a stockholders' meeting, held upon due notice to the stockholders. *Id.*

3. The system known as the "cumulative vote" does not alter the general rule that when, for any reason, there has been a failure to elect a full board of directors, it is the duty of the corporation to proceed with another ballot. *Id.*

4. An election was held for seven directors of an electric light company, chartered under the act of 1874; five only received a plurality of votes cast, three others voted for received a tie vote. *Held*, the failure to elect the entire board did not affect the election of the five who received a plurality of votes; they constituted a quorum and their election was valid. *Wright v. Commonwealth*, 433.

5. The old board, under the circumstances, would not hold over. Had the stockholders not adjourned, but proceeded to ballot again, the result would have been legal, or they might have adjourned the election to a subsequent day. *Id.*

6. Whether the stockholders could cumulate again to fill the vacancies, not decided. *Id.*

7. Where a corporation is dissolved by the decrees of the courts of one state, a director of such corporation cannot avoid the obligation to obey the injunction order by removal to another state. *Williams, Receiver, v. Hintermeister*, 303.

8. A foreign corporation carrying on business of a commercial nature in the state of Pennsylvania is not prohibited from doing business by reason of non-compliance with the laws of the state requiring registration, etc. The legal capacity of a foreign corporation to transact business in the state of Pennsylvania can only be inquired into upon complaint of the commonwealth. *Id.*

9. A foreign corporation which has not complied with the act of April 22, 1874, is not competent to enter into a contract such as that involved in this case. *Atherton et al. v. City of Wilkes-Barre*, 331.

COSTS. See CERTIORARI. CORONER. PLEADING AND PRACTICE.

1. The fees of a witness who is rejected at the trial cannot be taxed as part of the costs. *Fisher v. Scott et al.*, 6.

2. An agent for the Society for the Prevention of Cruelty to Animals is a peace officer, and should not be mulcted in costs when prosecution is begun in good faith. *Commonwealth v. Grim et al.*, 326.

3. The mileage to be allowed witnesses is according to the distance by the usual and ordinary route of traveling by the common modes of conveyance. Because a railroad has been built which is longer by several miles than the common road, that is no reason why mileage on the longer (the railroad) route should be allowed. *Johnson v. A. & N. P. R. R. Company*, 335.

COUNTY. See CORONER.

COUNTY BRIDGES.

1. The act of April 16, 1870, "providing the manner in which county bridges shall be built in the county of Luzerne," construed, and said act held to apply to bridges across a stream dividing a township from a borough or city. *City of Wilkes-Barre v. County of Luzerne*, 103.

2. The court will refuse to approve the report of a grand jury in favor of building a county bridge, where it appears that the foreman of the jury was one of the original petitioners for the bridge. *Bridge in Nescopeck*, 365.

COUNTY OFFICER. See CENSUS. EVIDENCE.

COURTS. See ATTACHMENT AND ATTACHMENT EXECUTION. ATTORNEY AND CLIENT.

1. The court has power to establish a rule governing the entry of judgments on notes containing confessions; but if judgment is entered, in disregard of the rule, the court will make such orders as will preserve the rights of the parties. *Herman v. Rinker et al.*, 130.

2. The court will not re-consider a rule which has already been passed upon by a prior judge of the court. *Id.*

3. The court may prescribe, by standing order, that the rule on a garnishee to answer inter-

COURTS. (Continued.)

rogatories, may issue as matter of course on filing *præcipe* therefor in the prothonotary's office. *Montanye v. Husted et al.*, 215.

4. In strict practice the rule should expressly state the time when, and the place where, the answers shall be presented. *Id.*

CRIMINAL LAW. See INSOLVENT.

1. Where it appears on the face of an indictment that the offense charged is barred by the statute of limitations, the indictment may be quashed, and cannot be amended so as to bring the case within the time when the offense can be prosecuted. *Commonwealth v. Owens*, 40.

2. A separate penalty may be imposed upon a merchant violating the Sunday laws for each separate sale made to different persons, although upon the same day. *Reiff v. Commonwealth*, 79.

3. An indictment for obtaining goods by false pretenses must state the goods to be the property of some person named, and an omission of such allegation renders the indictment incurably defective. *Commonwealth v. Graham*, 163.

4. The destruction of a boat may be the subject of indictment for malicious mischief at common law. *Commonwealth v. Bryant*, 164.

5. Consent of the prosecutor is no defense to the crime of sodomy. *Commonwealth v. Smith*, 362.

6. But where the prosecutor consents he is treated as an accomplice and should be corroborated. *Id.*

7. Where there is evidence tending to show his consent, and also evidence the other way, it should be submitted to the jury, and its bearing explained by the court, with the advice, if the jury should find that the prosecutor consented, not to convict on his uncorroborated testimony. *Id.*

8. In a prosecution for libel, where the alleged libellous matter is a privileged communication, malice or negligence must be proved affirmatively, beyond a reasonable doubt, by extrinsic evidence, and cannot be inferred from the language alone of the matter published. *Commonwealth v. McClure*, 437.

9. Discussion in a newspaper of the character of a private citizen who advocates a candidate for federal appointment by circulating petition and by solicitation and other personal influence, is a privileged communication under Section 7, Article I., of the constitution of 1874. *Id.*

DECEDENT'S ESTATES. See SPECIFIC PERFORMANCE. TRUSTERS.

1. The refunding bond which an executor is entitled to demand from the heirs, can be demanded where the executor makes distribution, but not where the distribution is made by an auditor and confirmed by the court. *Barlet's Estate*, 69.

2. The inventory is a *prima facie* charge against executors, and credits cannot be allowed in their account for worthless debts without proof of the insolvency of the debtors, where the inventory is silent upon the subject. *Estate of Jacob Billheimer*, 120.

3. An account may be considered a final one from its nature and character, although it be not so denominated. After the whole inventory has been accounted for, fees have been adjusted and the whole matter has been treated by the court as finally settled, the accountants cannot, after the lapse of five years, open the same by filing what they call a final account, so as to claim credits which they allege were, by omission, left out of the former account. *Id.*

4. A residuary fund, in the absence of any special provision to the contrary, must bear the burden of payment of debts, legacies, and general expenses of the trust. *Kidder Estate*, 393.

5. Where an estate consists of proceeds of sales of real estate and from coal rents, they must be accounted for separately. *Id.*

DIVORCE.

1. The adultery of the libellant is, in itself, a bar to a divorce only in cases where adultery is alleged as cause for the divorce. *Larson v. Larson*, 7.

2. In cases based on desertion the adultery of the libellant may be shown as a cause justifying the libellee in leaving the libellant. *Id.*

3. But in cases based on personal indignities, etc., the adultery of the libellant is not, in itself, a defense, and cannot be set up as a justification. *Id.*

4. It is the uniform practice in divorce suits, if the wife has no separate estate, whether she be libellant or respondent, to make an order for maintenance *pendente lite*, and expenses. *Renniman v. Renniman*, 235.

DIVORCE. (Continued.)

5. Separate earnings (as a school teacher) and his indebtedness, are both proper facts to be taken into account in determining the amount which ought to be allowed her for her maintenance pending the litigation, but ϕ either fact, nor both together, can be set up to entirely relieve him from his legal and moral obligation so long as he is in undisturbed enjoyment of his estate and in receipt of the income therefrom. *Id.*

6. The court has no jurisdiction in a suit for divorce where the alleged desertion on which, proceedings were based took place in another state, without a change of domicile on the part of the husband, he being the respondent. *Marlin v. Marlin*, 400.

DURESS. See VOLUNTARY PAYMENT.

1. To constitute duress at law, the arrest must have been originally illegal, or have become so by subsequent abuse of it. *Lord v. Breese et al.*, 253.

EASEMENTS AND SERVITUDES. See INJUNCTION. WATER AND WATER COURSES.

EJECTMENT. See EQUITABLE EJECTMENT.

ELECTION.

1. An affidavit of the requisite number of qualified electors is necessary to give jurisdiction to the court in the matter of a contested election. *Williams v. Johnson*, 223.

2. An amendment to the petition and affidavit, by inserting after the time prescribed by the statute the name of a qualified elector in the place of one who is found to be disqualified, will not be allowed. *Id.*

ELECTION DISTRICTS.

1. The act of May 18, 1876, P. L. 178, applies not only to a general division of a township into election districts, but also to the creation of an additional district out of a part of one of the districts into which a township has already been divided. *In re Erection of Additional Election District in Huntington Township*, 387.

2. The above act supersedes Sec. 1st, Rule III., Rules of Court of Luzerne County, in all particulars where they are inconsistent. *Id.*

3. The petition must be signed by "twenty freeholders resident in the township." It need not be averred that they are qualified voters of the district. *Id.*

4. Twenty of the petitioners must be residents, and each of the twenty must be the owner of a freehold estate in possession in lands situated in the township to be divided. *Id.*

5. A petition was presented signed by fifty-seven persons, only nineteen of whom were qualified as above required. After the commissioners had been appointed, but before they had reported, the petition was amended, by leave of court, by the addition of three other names. *Held*, that the court had power, upon discovery of the mistake, to permit the amendment. *Williams v. Johnson*, 16 W. N. C. 223 distinguished. *Id.*

6. Where the evidence for and against the new district was evenly balanced, but it appeared that a considerable number of the voters would be greatly inconvenienced thereby, and it would not be feasible to accomplish the same result by a change of the polling place, the report of the commissioners in favor of the district was confirmed. *Id.*

7. Erection of new election district refused where it appeared that the report of reviewers was adverse to the same, that the whole number of votes polled in the township was only about one hundred, that the present polling place was near the centre of the township and was conveniently reached by the public roads therein, and the division was opposed by a large number of the inhabitants, including many of the original petitioners. *In Re Division of Jackson Township*, 502.

EMINENT DOMAIN. See RAILROADS.

EQUITY. See INJUNCTION.

1. The jurisdiction of the court to exercise the powers of a court of chancery, depends upon statutory enactments. *Fitley et al. v. The Ithaca Organ and Piano Company*, 327.

2. Our courts do not possess equitable jurisdiction over a foreign corporation, which has failed to comply with our laws prohibiting such corporation from doing business in this state.

3. The doctrine of equitable estoppel is firmly fixed in our law, and where a contract prohibited by law has been executed, and both parties are in *pari delicto*, neither can maintain an action to rescind it. Where the contract is still executory, however, equity will interfere. The law will not lend its support to a claim founded on its own violation. *Atherton et al. v. City of Wilkes-Barre, et al.*, 331.

EQUITABLE EJECTMENT.

1. Where a vendee under articles of agreement for the sale of land confesses judgment in an amicable action of ejectment, at the same time agreeing that the affidavit of the plaintiff filed therewith shall be sufficient evidence of default in payment of the instalments, and shall entitle him to issue a writ of *habere facias* at once, the writ may issue without leave of court. *Lanning v. Davies*, 207.

2. The court has power in an equitable ejectment to modify the conditions of the verdict of a jury or of the report of a referee, in order more effectually to do equity. *Moore v. Habel*, 199.

3. Neither law nor equity will permit a vendee to hold the land and at the same time withhold payment of the purchase money upon the doubtful contingency that the land may at some

EQUITABLE EJECTMENT. (Continued.)

time be resorted to for pecuniary legacies which are, *prima facie*, presumed to be paid, provided indemnity is given. *Id.*

4. Though equity will not compel a vendee to take a defective title, it will compel him to take a good title subject to a pecuniary charge against which adequate security has been given. *Id.*

ERRORS AND APPEALS. See SUPERSEDEAS. SUMMARY CONVICTION.

1. An appeal to the Supreme Court from the decision of the court below upon a case stated does not lie unless such right of appeal is reserved in the case stated. *Shainline's Appeal*, 192.

2. Where a party desiring to take an appeal from the judgment of a magistrate, calls at his office for that purpose, it is the duty of the officer to give all the necessary information as to the requirements and proper method of so doing. If he fails to do this the court will allow an appeal *nunc pro tunc*. *Vandermark v. Borough of Nanticoke*, 435.

ESTOPPEL.

1. Admissions made in the course of judicial proceedings which have been held to be conclusive against the party, seem, for the most part, to be those on the faith of which a court has been led to adopt a particular course of proceeding, or on which another person has been induced to alter his condition. *Treffeison Assignment*, 205.

EVIDENCE. See ASSUMPSIT. ATTACHMENT AND ATACHMENT EXECUTION. ATTORNEY AND CLIENT. CONFLICT OF LAWS. CORONER. ESTOPPEL. NEGOTIABLE INSTRUMENTS. PAYMENT.

1. Evidence of fraudulent assignment considered. *Goldstein et al. v. Sondheim*, 8.

2. The population of a county in any particular year is a matter susceptible of proof like any other fact, and is also a proper subject of agreement by the parties, if they see fit to dispense with proof. *Glennon v. County of Luzerne*, 77.

3. Before the act of 1869 (witnesses) a party to commercial paper, negotiated in the ordinary course of business before maturity, was incompetent to testify to anything tending to impeach its validity, before or at the time it passed out of his hands. *Pardee & Markle v. John*, 111.

4. The act of 1869 does not affect the rule, in a case within the *proviso*, relating to suits by and against executors, etc. *Id.*

5. The endorser may, notwithstanding the above rule, testify to payment of the note in a suit against a maker. *Id.*

6. The endorser, in a suit against the maker, testified in general terms that the note was paid "by judgment and property." *Held* to be insufficient. *Id.*

7. Plaintiff testified that defendant promised to pay the printing for the democratic committee; another witness partly corroborated that; defendant testified that he had no recollection of such a contract. *Held*, that the evidence was sufficient with plaintiff's book entries to establish his claim. *Hills v. Woodward*, 125.

8. Silence is in itself an important fact when the defendant has the opportunity and declines to speak in explanation of other relevant facts peculiarly within his knowledge. *Terry v. Knoll*, 121.

9. Where a motion to open a judgment has been delayed for a long time after knowledge of the defense, and the delay has been continued until witnesses have died or been disqualified, and the defense then set up rests chiefly on the testimony of the defendant, his testimony, in so far as it is in conflict with that of the other witnesses, ought to be scrutinized with every great care. *Lord v. Breece et al.*, 253.

EVIDENCE. (Continued.)

10. Application of the rule that, in the absence of fraud and mistake, a written contract is presumed to have merged in it a previous parol agreement relating to the same subject matter. *Pettebone Executor v. Beardslee, et al.*, 337.

11. The plaintiff, defendant and two sureties on certain judgment notes being present at a sheriff's sale of defendant's personal property, the sureties testified that they were prepared to bid up the property to an amount sufficient to cover the judgments; that the defendant informed them that the property was to be struck down to the plaintiff at a nominal sum and the judgments satisfied; that this remark was addressed not to plaintiff or in the course of a conversation with him, but was spoken in a room in a tone of voice loud enough for the plaintiff, who stood by the door with the sheriff, to have heard if he had been listening. The plaintiff testified that he heard no such remark and that he made no such agreement with the defendant. *Held*, that this was sufficient evidence to open the judgment and submit to a jury to decide whether plaintiff acquiesced in the statement of defendant to the sureties. *Id.*

12. The evidence of an accomplice or *particeps criminis* is within the lines of competent proof, but is looked upon with suspicion, and requires corroboration. *In Re Gates*, 373.

13. The widow of a decedent is a competent witness to prove cruel and barbarous treatment by her husband. *Groves' Estate*, 448.

EXECUTION. See AUDITOR. ATTACHMENT AND ATTACHMENT EXECUTION. ORPHANS' COURT. SHERIFF AND SHERIFF'S SALES.

EXECUTORS AND ADMINISTRATORS. See DECEDENTS ESTATES. LEGACIES.

EXEMPTION.

1. Where there are two executions in the hands of the sheriff, and also an attachment, the defendant, having waived the benefit of the three hundred dollar exemption in one of the executions, cannot set up his claim to the benefit thereof as to the attachment. *Wiseman et al. Appeal*, 151.

2. In order to secure the benefits accruing under the acts of April 26, 1890, and April 14, 1891, allowing \$300 exemption to the widow of a decedent, the claimant must reside within the limits of this state. *Groves' Estate*, 448.

3. To secure the beneficial operation of these acts claimants must make their demands within a reasonable time. After the full expenses of administration have been incurred, it is too late. *Id.*

FEES. See CENSUS. CORONER.

FEME SOLE. See MARRIED WOMEN.

FOREIGN ATTACHMENT. See ATTACHMENT AND ATTACHMENT EXECUTION. PLEADING AND PRACTICE.

FOREIGN INSURANCE COMPANY.

1. Service of summons upon *foreign insurance company* must be made on the duly designated agent, if the company has one. *Fidelity Casualty Company v. Ketrick et ux.*, 31.

FOREIGN JUDGMENT.

1. Conclusiveness of the judgments of a sister state considered. *Tuggle v. Leath et ux.*, 41.

FRAUD. See CONTRACT. LANDLORD AND TENANT.

FRAUDULENT ASSIGNMENT. See ATTACHMENT AND ATTACHMENT EXECUTION.

FREEHOLDER. See PLEADING AND PRACTICE.

GARNISHEE. See ATTACHMENT AND ATTACHMENT EXECUTION.

GUARDIAN AND WARD.

1. Bills *contracted* by a guardian for necessities for his ward, but not *paid* by him, cannot be allowed as credits in his account with the ward after he becomes of age. *Myers' Estate*, 360.

2. Incompetency or carelessness in the management of an estate by a guardian whereby litigation ensues between him and his ward, will be ground for a reduction of his compensation and the imposition of costs. *Id.*

3. Nothing will be allowed a guardian for past support after the ward arrives at fourteen years of age, unless he be sent to school or a trade, or other special circumstances warrant it. *Tubbs' Estate*, 369.

GUARDIAN AND WARD. (Continued.)

4. Allowance for past support may be made under proper circumstances, but a previous order should be obtained where any considerable sum is being expended. *Id.*

5. Where a child lives with its near relatives as a member of the family there is no implied promise that anything is to be paid for labor done, unless some sort of a previous contract be shown. *Id.*

HABEAS CORPUS.

1. In a contest between relatives for the custody of infants, where they will not in any event be under the personal care and guardianship of a parent, the question is one of discretion, and in exercising that discretion the judge will chiefly consider the welfare of the infants. *Commonwealth ex rel. v. Reilly et ux.*, 220.

HUSBAND AND WIFE. See CONFLICT OF LAWS. DIVORCE. MARRIED WOMEN.

1. A husband has a right to appear in any judicial proceeding to defend his wife's interests. *McMonegal, Assignee, v. Featherston*, 519.

INFANT. See HABEAS CORPUS.

INJUNCTION. See LANDLORD AND TENANT.

1. Generally, preliminary injunction will not be awarded in a doubtful case. *McKean et al. v. Brown et al.*, 117.

2. An injunction at the suit of the landlord whose tenant has accepted a lease from another, will not lie to restrain the latter from proceeding on the lease to judgment. *Lowenstein v. Keller*, 257.

3. *It seems*, however, that an injunction will lie to prevent such judgment from being used to put the rightful owner out of possession, and thus compelling him to bring ejectment to regain the same, especially if it is clearly proven that the tenant was induced by fraud to accept the lease proceeded upon. *Id.*

4. The remedy by injunction is not granted, of course, in every case of an infringement of a riparian right, but only to prevent irreparable mischief, or an injury such as could not be compensated in a suit at law. *Wilkes-Barre Water Co. v. Lehigh Coal and Navigation Co.*, 319.

5. Plaintiff was the lessee of a suite of rooms on the third floor, and defendant was the lessee of a suite of rooms on the second floor, of a certain building. There was a single front door, hall, and stairway common to both suites of rooms. Defendant claimed and exercised the right to keep said front door locked, thus compelling the plaintiff and members of his family to unlock it when they wished to enter or admit visitors. Plaintiff prayed for an injunction. *Held*, that the parties had a common right of way as to front door, hall, and stairs, which, however, each was bound to exercise *reasonably*: that keeping said door locked at all hours was undoubtedly a serious inconvenience and injury to the plaintiff, and, therefore, an injunction should be granted to restrain the defendant from keeping said door locked, except between the hours of 8:30 P. M. and 6:30 A. M. *Kleeman v. Kemmerer, et ux.*, 454.

INSOLVENT. See ASSIGNMENT.

1. A person arrested under a *capias ad satisfaciendum*, and applying for a discharge under the insolvent laws, is not entitled to such discharge unless he has undergone an actual confinement of at least sixty days. The fact that such party has been convicted on a criminal charge for the same offense as that upon which the judgment on which the *capias* has issued was founded, and has been imprisoned under sentence in such case for a less term than sixty days, does not entitle him to a discharge. *Scranton's Appeal*, 219.

ISLANDS.

1. What is an island in the contemplation of the Pennsylvania statutes, and the method of acquiring title thereto. *Winchester et al. v. Pennsylvania Coal Company et al.*, 81.

2. River warrants laid, by authority of law, upon the *bed* of the river, should stop at low water mark around the shore of an island, instead of running through or over it. *Id.*

3. The doctrine of accretion does not apply to a case like this. The question here is, what was the condition, location, and size of this island at the time the plaintiffs' title attached? It is that condition, and not the island as affected by accretions since, which fixes the bed of the river for the purposes of this case. *Id.*

JUDGMENT. See PRACTICE AND PLEADING. REPLEVIN AND REPLEVIN BOND.

1. The court will not strike off judgment entered on the transcript of a justice of the peace for matters not appearing on the face of the transcript. *Strybert v. Owens*, 430.
2. Judgment was entered on a transcript, which the defendant moved to strike off upon the ground that an appeal had been taken. The appeal on its face was invalid. Motion to strike off judgment was refused. *Id.*

JUSTICE OF THE PEACE. See CERTIORARI. ERRORS AND APPEALS. WARRANT OF ARREST.

1. An action arising out of a contract for the sale of land, and in which the title is necessarily involved, is not within the jurisdiction of a justice of the peace. *Creveling et al. v. Kindig*, 11.
2. An action based on the defendant's failure or refusal to perform his contract, and not on negligence in the performance of a duty implied by that contract, is within the jurisdiction of a justice of the peace. *Jenkins v. Jenkins*, 39.
3. A justice of one county may issue an execution upon a certified transcript of a judgment on the docket of a justice of another county, without a previous issue of execution by the latter justice. *Filan v. Hull*, 491.
4. It is not error to issue a *scire facias* on the certified transcript before issuing execution. *Id.*
5. Under the act of assembly of March 22, 1877, a justice of the peace is authorized to hold a case under consideration, and defer entering judgment, for ten days after the evidence has all been heard; and this without special notice to the parties interested. *Luke v. Schlegel*, 505.
6. The defendant (appellant) should be permitted, *nunc pro tunc*, to file the affidavit required by the wages act where the transcript discloses any uncertainty as to the plaintiff's claim being within them. *Reagan v. Stetler & Company*, 507.
7. Where a justice of the peace holds an inquest, it should appear by the return that he had jurisdiction by reason of absence or inability of the coroner, or that his office was more than ten miles distant from where the death occurred. *In Re Coroner's Inquests*, 427.

LANDLORD AND TENANT. See INJUNCTION.

1. The act of 1863 provides a complete system for determining controversies between landlord and tenant. *Lowenstein v. Keller*, 257.
2. It is competent to show in defense to proceedings to recover possession, that the defendant, being in possession under another landlord, was induced by fraud and misrepresentation to accept the lease upon which the proceedings are based. *Id.*

LEGACIES.

1. Where, after giving general pecuniary legacies, the testator blends his real, and personal estate in a residuary gift, a charge of the legacies on the real estate is implied. *Moore v. Habel*, 100.
2. The primary fund to pay legacies, whether charged on land or not, is the personal estate, unless special provision is made to the contrary. *Id.*
3. A legacy which has been due and unclaimed and without recognition for twenty years is presumed, *prima facie*, to have been paid. *Id.*
4. After the lapse of twenty-three years the mere allegation that there is not now any personal estate of the testator out of which the legacies can be collected, is not sufficiently explicit to warrant a resort to the land. *Id.*
5. The real estate charged with the payment of legacies is liable on a deficiency of assets, but not for misapplication, waste, or insolvency of the executor. *Id.*

LIBEL. See CRIMINAL LAW. INSOLVENT.

MANDAMUS. See PLEADING AND PRACTICE.

1. On the hearing of a rule to show cause why a mandamus should not issue, the only question is, whether the petition discloses sufficient ground for the allowance of the writ. *Com. ex rel. v. Norton, et al.*, 37.

MARRIED WOMEN. See CAPIAS.

1. It is not necessary that a married woman should actually be declared a *feme sole* trader in order to render her liable on her contracts. *Greacen v. Foster*, 110.
2. As a general rule a married women's confession of judgment is absolutely void, and this applies to a confession of judgment in an amicable action of ejectment to which the husband is not a party. *McMonegal, Assignee, v. Featherston*, 510.

MARRIED WOMEN. (Continued.)

3. A decree is not essential to the enjoyment by a married woman of the privileges conferred by the *feme sole* trader acts of 1718 and 1855. *Id.*
4. It seems that a married woman who, by reason of the desertion or drunkenness and neglect of her husband, is entitled to the benefits of those acts, may confess a judgment in ejectment in favor of the vendor for land held by her under contract, without the joinder of her husband. *Id.*

MASTER AND SERVANT. See NEGLIGENCE.

MECHANIC'S LIEN.

1. Laborers employed by a sub-contractor cannot file a lien. *Ferren et ux. v. Perry et al.*, 525.
2. A lien will not be stricken off upon proof *dehors* the record that the person named in the claim as the contractor was not such. *Id.*
3. Where the contract was with a person, not the owner, the claim must show with reasonable certainty that he bore to the owner the relation of contractor, architect or builder. *Id.*
4. The language of the claim was: "The person with whom said claimants contracted is William Cool. The amount claimed to be due is forty dollars," etc. *Held*, that the lien was defective on its face, because it did not aver that William Cool was the contractor, architect or builder. *Id.*

MERCANTILE TAXES.

1. A butcher having a slaughter house, and selling meat of his own killing in the public market or from his wagon, is not liable to assessment for a license. But if, in addition, he deals in cured or salted meats not of his own killing, to the extent of over five hundred dollars per year in value, he is liable to taxation for license. *Commonwealth v. Finnerl*, 239.
2. Persons styling themselves "butchers," but having no slaughter houses; who sell meats in market, or otherwise, not of their own killing, but prepare and handle it after it has been dressed, and cut it into suitable pieces for sale, are taxable for license as dealers in meat. *Commonwealth v. Bickings et al.*, 246.
3. Butchers having meat stores apart from their slaughter house premises are liable to assessment. *Commonwealth v. Beener et al.*, 251.

MINES AND MINING.

1. The new mine law approved June 30, 1885, is a penal statute, and, as such, is to be strictly construed, but its wise and benevolent purpose is not to be defeated by judicial refinements, and an over-sensitive regard for possible doubts. *Commonwealth v. Coonrad*, 311.
2. Under Rule 8th of Article XII., if, by reason of noxious gases, or of any cause whatever, an anthracite coal mine has become dangerous, it is the duty of the mine foreman to compel every workman to retire from the mine, and to remain out until after a proper examination of its condition has been made. Failure to do this is negligence and a disobedience of the law. *Id.*
3. The nature and character of the duty and authority vested by this act in the mine foreman, and the responsibility of that officer for disasters which occur because of non-compliance with the requirements thereof. *Id.*

MUNICIPAL CORPORATION. See SUMMARY CONVICTION.

NEGLECTENCE.

1. The law of negligence as between employer and employee. *Drew v. Gaylord Coal Company*, 1.
2. Where an injury happens to a servant in the use of machinery in the usual course of his employment, of the nature of which he is as much aware as his master, and the use of which is the proximate cause of the injury, the servant cannot recover. *Id.*
3. Nor does it vary the rule in this respect that the master has in use an engine or machine less safe than some other which is in general use, or that there was another and safer mode of doing the business. *Id.*
4. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that is required from the employer. This is the limit of his responsibility and the sum of his duty. *Id.*

NEGOTIABLE INSTRUMENTS.

1. If the note appeared on its face to have been regularly negotiated before maturity, the contrary could not be proved by the endorser in order to make way for his testimony as to matters of defense existing anterior to, and at the time of, the making or negotiation of the note. *Pardee v. Markle & Johns*, 111.

2. In a suit by an endorsee against the maker, a release of the endorser by the maker would not make him a competent witness for the latter to testify to facts invalidating the note, there being no evidence *alimunde* that it was not negotiated before maturity. *Id.*

NEW TRIAL. See CRIMINAL LAW.

1. It is the duty of the court to grant a new trial where the verdict is clearly against the weight of the testimony. *Rothhofski v. Haddock*, 453.

ORPHANS' COURT.

1. Proceedings in Orphans' Court should be according to equitable forms, by petition, answer, and replication. *Estate of Daniel Lee*, 155.

2. The amount found due in the hands of an administrator was distributed by an auditor, before whom a note payable to the decedent and signed by one of the heirs was presented, and a claim made that the amount thereof should be deducted from the share in the estate of said heir. The auditor held that he had no authority to make such deduction, and suggested that the administrator make a demand for the debt when the heir called for his distributive share. No exception was taken to this ruling, and the report of the auditor was confirmed. The heir subsequently asked the Orphans' Court to issue a *fi. fa.* to collect from the administrator the amount awarded him, which was less than the amount of note, whereupon the administrator resisted, claiming the right to set off said note against such distributive share. Held, that the confirmation of the auditor's report was conclusive upon the parties interested, and that if any remedy existed it was by review. *Id.*

3. An Orphans' Court sale will not be set aside if fairly made on the terms prescribed by the court, if no one offers more at a re-sale. *Estate of William Wright*, 387.

PARTITION.

1. The usual commissions allowed in proceedings to sell real estate in partition are two and one-half per cent., and not five per cent., as in cases of general administration of personal estates. *Welch's Estate*, 385.

PAYMENT. See SETOFF.

1. A witness testifying to payment "by judgment and property" must give facts, not conclusions, and if from such facts payment would legally result as a conclusion, the question as to the existence of the facts goes to the jury. *Pardee & Markle v. Johns*, 111.

2. The rule of the common law in regard to the application of payments, is to allow the creditor to make such application as he pleases, provided there is no direction by the debtor, and no definite contract on the subject. *Brown v. Coray*, 301.

PRACTICE AND PLEADING. See ATTACHMENT AND ATTACHMENT EXECUTION. CAPIAS.

CASE STATED. CENSUS. JUDGMENT. REFERENCE. SETOFF.

1. The duty of the court to grant non suits in certain cases. *Drew v. Gaylord Coal Co.*, 1.

2. An answer is not required until the alternative writ has been allowed and issued. Depositions in denial of the facts therein alleged cannot be considered. Unless it admits the material allegations of the petition it should be met by demurrer, plea, or traverse, and an issue should be thus formed upon which judgment can be rendered. If it be an issue of fact it goes to a jury. *Commonwealth ex. rel. v. Norton et al.*, 37.

3. Where a defendant in an action for wages (in Luzerne county) appeals from the judgment of a justice, and on the trial of the case in court a verdict is rendered against him, he is liable for the costs, no matter what the amount of the verdict, unless, when taking the appeal, he filed an affidavit admitting a certain amount to be due, and judgment was entered for said amount by the justice as provided in the act of February 28, 1870, P. L. 269. *Redmer v. Markle & Co.*, 113.

4. A plea in abatement will not ordinarily be received after a plea in bar, but where a plea in bar has been entered inadvertently and by mistake, and the defendant has not been in default, and applies at once, it is in the discretionary power of the court to permit him to withdraw it and to plead in abatement. *Harrison v. Tillinghast et al.*, 114.

PRACTICE AND PLEADING. (Continued.)

5. On a rule to show cause of action, counter affidavits cannot be read; nor can the plaintiff be cross-examined; nor, if his affidavit is insufficient, will supplementary affidavits be received. *Falk v. Wuraburger*, 211.
6. The release of the lien of an incumbrance, after the defendant's arrest on a *capias*, will not authorize an abatement of the writ upon the ground that he is a freeholder. *Gerry v. Sheridan*, 513.
7. Possibly it would authorize his discharge on common bail. *Id.*
8. A freeholder to be privileged from arrest must have an estate clear of incumbrance, and the court will not inquire if the estate is sufficient beyond the incumbrance to satisfy the demand. *Id.*
9. Judgment by default taken in violation of an act of assembly and rule of court will be stricken off. *Piatt v. Sickler et al.*, 517.
10. Mere lapse of time after the entry of judgment, where it is not shown that the defendant knew of such entry, will not be considered a waiver of an irregularity in taking judgment. *Id.*
11. Judgment by default must be taken in term time. *Id.*
12. Plaintiff may enter a *nolle prosequi* as to one defendant only. *Nyman v. Sullivan*, 232.

RAILROAD.

1. Where the bond of a railroad company for the payment of damages for the taking of land for a branch road is merely informal, not fatally defective in its execution, objection should be made at the time of its presentation for approval. *Myers v. Delaware, Lackawanna and Western Railroad Company*, 247.
2. The formal attestation of the seal of the company and of the signature of the president is not essential to its validity. In a suit on the bond these may be proved otherwise. *Id.*
3. Authority from the company to file the bond is to be presumed in the first instance from its execution and presentation for approval. After the corporation proceeds under it to take the land they will be estopped from denying the authority under which it was filed. *Id.*
4. Authority of railroad company to take land for "branch" or "side track" considered. *Id.*
5. Where a bond of a railroad company is presented for approval, and it does not appear upon the face of the proceedings that the proposed appropriation of land is illegal or unconstitutional, the court will not receive testimony tending to show that the corporation is proceeding in excess of its powers. *Id.*
6. The giving and approving of the bond are conditions precedent to the exercise of the power to appropriate land by a railroad company, but these acts are not conclusive against the land owner, except as to those matters which are essential to the adjudication. *Id.*

RECEIVER. See ATTACHMENT AND ATTACHMENT EXECUTION.

1. The appointment of a receiver in one state is recognized, as a matter of comity, in others, unless his claims are in conflict with those of citizens of the others. *Filley et al. v. The Ithaca Organ and Piano Company*, 327.
2. Where a receiver has been appointed by a court of competent jurisdiction in one state, the United States Circuit Court will, on proper cause shown, appoint an ancillary receiver in Pennsylvania. *Williams, Receiver, v. Hintermeister*, 503.

REFEREE. See EQUITABLE EJECTMENT.

1. The power of the court to re-commit the report of a referee upon the allegation of after-discovered evidence is no greater than its discretionary power at common law to grant new trials, and its exercise is to be governed by the same general principles. *Moore v. Habel*, 100.

REPLEVIN AND REPLEVIN BOND.

1. Judgment may be entered upon the warrant of attorney in a replevin bond, and execution issued without assignment of breaches or *scire facias* to ascertain the damages. *Shippey v. Evans et al.*, 388.
2. If execution is issued for too great a sum, relief will be afforded by the court by opening the judgment. *Id.*
3. The conditions in a replevin bond are independent of each other, and failure to prosecute the replevin suit with effect works a breach of the condition in the bond. *Id.*
4. It is not necessary, in order to recover upon a replevin bond, that there should be a judgment that the property be returned. *Id.*

REPLEVIN AND REPLEVIN BOND. (Continued.)

5. The act of April 3, 1779, was intended to prevent interference with constables or other officers in the discharge of their duties, by replevins upon property taken in execution, and for which he is responsible. It does not apply to cases where the owner of the property, and not the officer, is the defendant in the replevin. *Twiss v. Cole*, 401.

ROADS.

1. Where the law makes it the duty of viewers to endeavor to procure releases from the persons over whose land the road or street is laid, it will be presumed that they performed their duty in this particular until the contrary is shown. It is not essential to state the fact in the report. *In Re Delaware Street*, 251.

2. Under the charter of the city of Wilkes-Barre the rule of assessment for contribution against adjoining property owners upon opening streets is "benefits received." Hence, where the viewers apportioned and assessed the expense upon the properties supposed to be benefitted according to the foot front, without regard to other facts, it was held that the basis of assessment was erroneous, and their report was set aside. *Id.*

3. The frontage rule of assessment is one which the legislature, and that body alone, may adopt as a substitute for an assessment by a disinterested tribunal. Viewers appointed to ascertain the benefits and apportion the expense according thereto, do not perform their duties under the law by the adoption of this arbitrary rule without regard to other facts. *Id.*

4. Where the report of viewers (in the city of Wilkes-Barre) is made on a totally erroneous basis, so as to be incapable of modification, it is the duty of the court to set it aside. *Id.*

5. The rule which excludes the testimony of jurors tending to impeach their verdict has never been applied with the same strictness to the testimony of road and street viewers. *Id.*

6. Where a road has simply been cut through, but has not, either wholly or in part, been opened and made passable for public travel, it cannot be vacated, except upon the petition of a majority of the original petitioners for the road. *In Re Road in Huntington*, 207.

7. The employment of one of the viewers as surveyor of the road, and payment for his services as such by the petitioners, is fatal to the proceedings. *In re Road in Whitemarsh et al.*, 450.

SALARIES. See CENSUS.

SCIRE FACIAS. See JUSTICE OF THE PEACE.

SETOFF. See WAGES.

1. The tender of a check upon plaintiff in payment of a note will not support a claim for setoff, unless the defendant still tenders it at the trial. *Mountain City Banking Company v. Meyer*, 107.

2. An endorser cannot obtain the check of a depositor in a bank, after the insolvency of the latter, and use it to set off the bank's claim on the note. *Id.*

3. The defendant pleaded *non assumpsit payment with leave, etc.*, and on the trial before the referee gave in evidence an account against the plaintiff for goods sold and delivered, which the referee allowed and reported a balance in defendant's favor. Held, that a certificate in the defendant's favor was proper under the pleadings. *White v. Walker*, 277.

4. Where a debtor, with knowledge that his creditor—a bank—has made an assignment of all its assets for the benefit of creditors, buys up a claim against the assignor and seeks to use it as an offset for the full amount in an action brought by the assignee of the bank, the burden of proof that the assignor was solvent rests on the defendant. *Nesbitt, Assignee, v. Dodson*, 511.

5. In case of the solvency of the assignor, to avoid circuitry of action, the offset will be allowed, otherwise not. *Id.*

SHERIFF AND SHERIFF'S SALE.

1. A building fitted up and used as a store property should be described as such in the advertisement of the sheriff, and not merely as a "house." Sheriff's sale set aside because of such omission in the description of the property. *Kington v. Hoffman*, 240.

SLANDER. See CAPIAS.

SPECIFIC PERFORMANCE.

1. The jurisdiction of equity to decree specific performance of contracts, is not confined to contracts relating to real property exclusively. *McKean et al. v. Brown et al.*, 117.

2. Specific performance of a decedent's contract is exclusively within the jurisdiction of the Orphan's Court. *In re Ruddy's petition*, 445.

STATUTE OF LIMITATIONS. See AMENDMENT.

1. If judgment is entered on a note, not under seal, containing a confession of judgment, which is more than six years old, the court will open such judgment to permit the defendant to plead the statute of limitations. *Herman v. Rinker et al.*, 199.

2. O. assigned a lien to L.; at the time of the assignment S., who acted as the agent of L. in the transaction, said that he would pay O. the consideration as soon as he got the money from his principal. Held, that the liability of L. to pay immediately was not thereby affected, and that the statute of limitations began to run on the date of the assignment, although the agent did not receive the money until some time afterwards. *O'Malley v. The Lusarne Building and Savings Association, of Pittston*, 203.

3. A subsequent acknowledgment and promise to pay a debt made by the agent who contracted it, will not prevent it from being barred by the statute, the promise not being made in pursuance of special authority, nor forming a part of the agent's proper business, nor founded on a new consideration. *Id.*

4. But a debt may be taken out of the statute by the act of an agent done in the regular course of his business, if he has special authority for that purpose, or if such authority be necessarily implied from the nature of his duties. *Id.*

STENOGRAPHER.

1. Except where there is the clearest proof of mistake, the stenographer's notes of trial must be regarded as conclusive. *Pittston Water Company v. Borough of Pittston*, 118.

SUBROGATION.

1. The remedy by subrogation is one of pure equity and benevolence, and there is no reason or authority for holding that time is of any consequence, provided the rights of all parties remain unchanged. *Weil's Estate*, 387.

SUMMARY CONVICTION.

1. Essentials which must appear of record in a summary conviction. *Johnson v. The Borough of Pittston*, 73.

2. Where an individual is arrested on view and is brought before a magistrate to be summarily proceeded against, before he is put upon trial the charge against him, if made orally, should distinctly and with certainty describe the particular violation of law or ordinance for which he has been arrested, and this should be made a matter of record as the foundation of the proceedings. *Id.*

3. The power to arrest on view for the violation of an ordinance not amounting to or tending to a breach of the peace—even if it can be conferred at all by mere ordinance—ought to be exercised with extreme caution and moderation. *Id.*

4. In cases of summary conviction no appeal from the judgment of the justice can be taken, unless allowed specially by the court upon cause shown. *Borough of Shenandoah v. McGuire et al.*, 109.

SUPERSEDEAS.

1. Where an appeal to the Supreme Court is taken from a decree authorizing the issue of bonds by school directors, the latter should not proceed to issue such bonds until the final decision under the revisory writ. *Hart et al. v. Second School District of Wilkes-Barre*, 45.

2. *Ewing v. Thompson*, 7 Wr. 375, discussed. *Id.*

TENDER. See SETOFF.

TIMBER. See TRESPASS.

TORTS. See WARRANT OF ARREST.

TOWNSHIP AND MUNICIPAL OFFICERS. See BOROUGH.

1. A township treasurer is not entitled to demand that the township funds shall be paid over to him before giving bond "to the satisfaction of the supervisors." *Commonwealth ex rel. v. Norton et al.*, 37.

2. The supervisors are the tribunal to decide as to the sufficiency of the bond. If they refuse to act in the matter at all the court, by mandamus, may compel them to act, but cannot compel them to adopt the judgment of the court as to the sufficiency of the bond in preference to their own. *Id.*

TOWNSHIP AND MUNICIPAL OFFICERS. (Continued.)

3. In many cases the word "township" in a statute is used as a general term to cover the several municipal divisions of a county, and where the intent so to use it becomes clear, it should be so construed by the court. *City of Wilkes-Barre v. County of Luzerne*, 193.

4. When no township treasurer has been appointed or elected, it is made the duty of supervisors, either to collect the rates and levies themselves, or to appoint a collector for the purpose of making the collections. *In re Granahan*, 421.

5. Where a township treasurer exists, the law provides that the supervisors and overseers of the poor shall annually, at a meeting, etc., appoint some suitable inhabitant of the township to be collector of the township rates and levies. *Id.*

6. Each supervisor may give security individually, in which case he shall not be responsible for the act of his associate in office. *Id.*

TRESPASS.

1. The action of trespass for cutting timber trees, if brought under the act of March 29, 1824, can only be maintained by the owner. *Hollenback v. Weller et al.*, 165.

2. The plaintiff had the undisputed legal title to an undivided three-fifths part of the *locus in quo*, and by the express reservation of his deed to Osborne as trustee, he was to receive and receipt for the rents, issues, and profits arising from the whole estate or land, to develop, improve and sell the same, without joinder of the trustee, to expend such moneys thereon as he might deem necessary, and to account for and pay over to the trustee two-fifths of the rents, issues, and profits received. *Held*, that the possession and legal dominion of the plaintiff over the land were such as to constitute him the owner, and to entitle him to maintain the action under the act of 1824 against a trespasser. *Id.*

3. To support an action of trespass there must exist in the plaintiff a right of property, and also a right to immediate possession. *Nyman v. Sullivan et al.*, 232.

4. The mere fact of becoming a purchaser at a judicial sale will not render a party liable in trespass, although, under certain circumstances, replevin might lie. *Id.*

TRUSTEES. See DECEDENTS' ESTATES.

1. The account of a trustee must show, 1st, his liability to the estate; 2d, the relation between the estate and each beneficiary. *Kidder's Estate*, 303.

2. Counsel fees will not be allowed trustees for any service performed by an attorney, except that which is strictly professional. *Id.*

3. No trustee can perform his ordinary duties by such an expensive agent as an attorney at law and expect the estate to foot the bill. *Id.*

4. Allowance may be made for services of counsel in procuring the appointment of trustees. *Id.*

5. When trustees blend trust funds with their own, they will be treated as borrowers of the fund so far as interest is concerned. *Id.*

6. Trustees will not be charged interest for funds on hand while awaiting the appointment of their successors. *Id.*

VENTILATION LAW. See MINES AND MINING.

VOLUNTARY PAYMENT.

1. Money voluntarily paid cannot be recovered back, even when the payment is made upon a demand which is unjust. To this rule, however, there are certain exceptions, and whether a given case falls under the rule or the exceptions is generally a question of fact to be ascertained by the jury from the evidence. *Coon et al. v. The Pennsylvania Canal Company*, 461.

2. A party may recover back money obtained from him by duress, extortion, imposition, or taking any undue advantage of his situation. *Id.*

WAGES. See JUSTICE OF THE PEACE. PLEADING AND PRACTICE.

1. The written notice given by persons claiming the benefit of the lien conferred by act of April 9, 1873, and supplement of June 13, 1883, must contain every element which, under said acts, is essential to establish his right of preference, although the form of the notice is immaterial. Hence, it must show, not only that the labor was done in a business defined in the act, but also that the property subject to the lien is embraced in the levy. *Allison v. Johnson*, 11 Norris, 314, followed. *In re Hunt*, 453.

2. The fair and reasonable construction of the act of June 29, 1881 (P. L. 147), is, that the employee may decline to receive anything but cash, or an order redeemable in cash, in payment

WAGES. (Continued.)

of his wages, but if he does receive goods *in payment* he waives his right to demand cash. *Row v. Haddock et al.*, 308.

3. Not decided whether the employer has the right of setoff, notwithstanding the act of 1881. *Id.*

WARRANT OF ARREST.

1. A *warrant of arrest* in an action of trespass is returnable forthwith, and if bail is not given to the constable for appearance at a future day, he is bound to return his process accordingly, and the justice is authorized at once to proceed and hear the case. *McConnell v. Gorman*, 106.

WARRANT AND SURVEY. See ISLANDS.

WATERS AND WATER COURSES.

1. The plaintiff was not only a lower riparian owner, but, as an incorporated water company, had acquired the right to take the water which would naturally flow into its reservoir and conduct it away to supply the inhabitants of a neighboring city. The defendant was a railroad company and claimed the right by virtue of a certain written release and a parol license from upper riparian owners to take a considerable portion of the water to supply their locomotive engines and a picnic ground. *Held*, (a) A material diminution of the volume of water by the defendant was an infringement of the plaintiff's right; (b) The diminution of the supply being of such magnitude as to create or materially contribute to the plaintiff's necessity to pump from other sources, it constituted a substantial injury, which might be prevented by injunction. *The Wilkes-Barre Water Company v. The Lehigh Coal and Navigation Company*, 319.

2. *It seems* that a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of a stream so as to sensibly affect the flow of the same by the lands of other riparian proprietors. *Id.*

3. Every riparian proprietor has a right to all the enjoyment he can derive from his interest in the stream, provided he exercises that enjoyment in a reasonable manner. *Id.*

4. An appropriation and conversion into steam of a portion of the water by a riparian owner to run locomotive or other engines may not be *per se* unreasonable, but such use of the water may become unreasonable because of the quantity taken. *Id.*

5. The necessities of the business of the upper owner are not the test of the reasonableness of such user, but the question is, whether there is such diminution of the water as to sensibly and injuriously affect the lower owner's enjoyment of the stream. *Id.*

WIDOW. See EXEMPTION.

WILKES-BARRE. See ROADS

WITNESSES. See COSTS.

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NO. 1

Court of Common Pleas of Luzerne County.

DREW v. GAYLORD COAL COMPANY.

1. The law of negligence as between employer and employee.
2. Where an injury happens to a servant in the use of machinery in the usual course of his employment, of the nature of which he is as much aware as his master, and the use of which is the proximate cause of the injury, the servant cannot recover.
3. Nor does it vary the rule in this respect that the master has in use an engine or machine less safe than some other which is in general use, or that there was another and safer mode of doing the business.
4. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that is required from the employer. This is the limit of his responsibility and the sum of his duty.
5. The duty of the court to grant non suits in certain cases.

Rule to show cause why compulsory non suit shall not be taken off.

The opinion of the court was delivered December 20, 1884, by

WOODWARD, J.—The plaintiff brought this action to recover damages for personal injuries received by him in the mines of the defendants. The accident which caused the injury was the result of the breaking of a draw-head or coupling between two loaded coal cars, as they were ascending the slope up which all the coal from these mines was taken. One of the cars thus detached ran very rapidly down the slope back into the mines. Near the bottom of the slope it left the track, throwing its contents to the ground. Pieces of the coal thus scattered struck the plaintiff, inflicting upon him personal injuries of a serious character, which laid him up for many months, and which, it is alleged, have permanently disabled him for active labor. At the conclusion of

the trial the defendants asked for a compulsory non suit, on the ground that the plaintiff had failed to produce any such evidence of negligence on their part as would justify the submission of the case to the jury. Upon such consideration as we were able to give the question thus presented, at the time, we granted the motion for a non suit, and at the same time entered the present rule. The plaintiff is a blacksmith, and as such had been employed in and about these mines for ten years. During all this time it had been his habit to enter and leave the mines by the slope. Upon the day of the accident he had been engaged in putting shoes on some of the mules, at work in different parts or passages of the mine, and while near the foot of the slope awaiting a movement of the cars which would permit him to reach the man way and go out of the mines, he met with the accident which we have already described. It will relieve us of the consideration of much irrelevant learning on the general subject of negligence to bear in mind at the outset, that the plaintiff was an employé of the defendants. The legal relation existing between the parties was that of master and servant. It follows from this, of course, that the law of negligence, and the evidence of negligence, must have reference to this relation. What, then, in its general statement, is the rule of the law as to the liability of the employer for injuries to the employé while engaged in his customary employment by reason of an accident? Judge Redfield, in his work on Railways, p. 387, quotes, with approval, the language of the court in *Dynen v. Leach*, 26 Law Jour. 221, as follows: "Where an injury happens to a servant in the use of machinery, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is the proximate cause of the injury, the servant cannot recover, there being no evidence of any personal negligence on his part conducing to the injury. Nor does it vary the case that the master has in use in his works an engine, or machine less safe than some other which is in general use, or that there was another and safer mode of doing the business, which had been discarded by his orders." The most recent cases in our own state on this subject, recognise and approve the same doctrine. In *Northern Central Railway Company v. Hasson et al*, 13 W. N.

C. 361, our Supreme Court say, "We cannot agree that the risk to which an employer subjects his employé suffices to impose liability upon the former, as being extraordinary in character, merely because the injury in a particular case might *possibly* have been prevented by some different device. Almost all accidents could be avoided if the special manner of their occurrence could be foreseen," etc. In *Pittsburgh & Connellsville Railroad v. Sentmyer*, 11 Nor. 280, the language of the court is as follows: "The master's liability arises from the fact that he subjects his servant to dangers, which, in good faith, he ought to provide against, but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so *without carelessness or breach of duty*." In *Payne v. Reese*, 4 Outer. 301, it was said that "an employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employé, it is all that is required from the employer—this is the limit of his responsibility, and the sum total of his duty." In the case before us there was an entire absence of proof that the machinery and mining appliances were not of an ordinarily safe character. Taken in its most favorable light for the plaintiff, the evidence showed no more than this—that other and safer methods for raising the coal might have been employed, and that if such methods had been adopted, the accident would probably not have happened. Whether the injury sustained by the plaintiff is to be traced, as its proximate cause, to the breaking of the draw-head, to the bad construction of the landing at the top of the slope, to a defect in the material or workmanship of the draw-head itself, or to the want of brakes or fans so arranged that they might have stopped the runaway car before it reached the point where the plaintiff was standing, it is not necessary, under the circumstance of the case, to decide. For, as we have said, there was no evidence that, in any of the particulars named, the machinery was not fairly and ordinarily safe, and furthermore, there was very distinct and affirmative evidence that the plaintiff, from his ten

years' employment at these mines, was entirely familiar with all the arrangements and machinery for mining the coal, as well as with the methods of entrance and exit to and from the mines themselves, usually adopted by all the employ  s. That we may be sure of this, let us examine the testimony of the plaintiff himself, as contained in his cross examination: Q. How long had you worked in that slope? A. About ten years. Q. Worked there before the Gaylord Company took it? A. Yes, sir. Q. Where was your shop, in which you worked located? A. Head of the mines, outside the head of the slope. Q. How long had you worked for the Gaylord Coal Company at the time this accident occurred? A. I don't know exactly how long. I commenced work for them when they took the place. Q. How many times a day were you in those mines during the time you were employed there? A. I could not answer—two or three times a day, generally. Q. You were familiar with all parts inside of that mine? A. I was pretty much—yes, sir. Q. Where did you go in the mines? A. Through the slope. Q. Where the car ran away? A. Yes, sir. Q. That is the place where you generally went in? A. Yes. Where we always went in. Q. Is that the place where you always came out? A. Yes, always.

The learned counsel for the plaintiff have referred us to several instances where the courts below have been reversed for refusing, in cases somewhat resembling the one before us, to submit the question of negligence to the jury. But a very careful reading of these cases has convinced us that they are clearly distinguishable from this case. For instance, in *Patterson v. Pittsburgh & Connellsville Railroad Company*, 26 P. F. S. 389, where the plaintiff, who was an employ   of the defendants, had been injured by reason of a badly constructed switch, the plaintiff proposed, as part of his offer of evidence, to prove "that the plaintiff had notified the superintendent of the railroad, and the foreman, also, of the said hazard and danger, and that they had promised to repair the same, so as to avoid the hazard and danger." The refusal of the court to admit this offer was held to be error. Again, in the case of *Baker v. Allegheny Railroad Company*, 14 Nor. 215, where the accident was caused by the breaking of a guy rope attached to a derrick, there was evidence that

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the rope was old, rotten, and unsafe. The Supreme Court say that this evidence of negligence should have gone to the jury. But they also state the rule of law to be, that "it is not negligence in the master, if the tool or machine breaks, whether from an internal original fault, not apparent when the machine or tool was first provided, or from an external apparent one produced by time and use, not brought to the master's knowledge." In the case before us it was shown that not less than one hundred men were employed in the mines operated by the Gaylord Coal Company. Four hundred and forty cars, upon an average, were hoisted up this slope every working day. That the manner of bringing the coal up the slope was regarded as fairly and ordinarily safe, is shown by the fact that no complaint had ever been made by any of the employes; as well as by the further fact that no accident resulting in personal injury to an employé, prior to the one in question, had ever happened. Nor was there any evidence in the case to show that the draw-head or coupling which broke was constructed of defective material, or by an incompetent workman. The alterations made at the head of the slope, and the precautionary measures adopted by the defendants to stop runaway cars, after the accident, while they might be cumulative evidences of negligence in a case where it was shown that the existing appliances were not ordinarily safe, cannot substantively and of themselves be held to establish negligence on the part of an employer. Science and experience are constantly suggesting improved methods and greater safeguards in conducting business, but to hold that their adoption implies previous want of ordinary care and is tantamount to proof of previous negligence would be to go further than any decision of our courts has yet gone. As to the duty of the court to grant compulsory non suits we refer to the following cases: *M. R. R. v. Barber*, 5 Ohio S. R. 567, where it is said that "what constitutes negligence in any particular relation is, ordinarily, a mixed question of law and fact, but what duty the law implies as incident to any particular relation or employment is always a question of law for the courts;" *P. & R. R. v. Schertle*, 1 Outer. 450, "where there is no evidence of negligence, or at most a *scintilla*, it is the duty of the court to withdraw the case from the jury;" *Northern Central R. R. v*

Hasson, *et al.* 13 W. N. C. 361, "where there is no evidence that the risk run by the decedent was extraordinary in its nature it is error to submit that question to the jury;" see also *King v. Boston & Worcester R. R.* 9 Cush. 112.

The rule to show cause why the non suit shall not be taken off is discharged.

A. Ricketts and C. W. McAlarney, for plaintiff.

H. W. Palmer and H. B. Payne, for defendants.

Court of Common Pleas of Philadelphia County.

FISHER v. SCOTT *et al.*

Practice—Costs—Taxation of

The fees of a witness who is rejected at the trial cannot be taxed as part of the costs.

Appeal from prothonotary's taxation of costs.

This was an action for goods sold and delivered, and resulted in a verdict for the defendants. The defense was that they had never ordered the goods, and had refused to receive them. Included in their bill of costs were charges for the attendance of witnesses by whom the defendants had offered to prove that the plaintiff had shipped goods to other parties who had not ordered them. The court overruled the offer and the witnesses did not testify. The prothonotary allowed these costs and the plaintiff appealed.

The opinion of the court was delivered June 21, 1884, by

ALLISON, P. J.—The facts which the defendants offered to prove by these witnesses were immaterial and irrelevant, and the offer was rejected by the court. The expenses of the witnesses cannot be taxed as part of the costs.

Exception sustained.

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Court of Common Pleas of Luzerne County.

LARSON v. LARSON.

Divorce—Counter charge of adultery when allowable in answer.

1. The adultery of the libellant is, in itself, a bar to a divorce only in cases where adultery is alleged as cause for the divorce.
2. In cases based on desertion the adultery of the libellant may be shown as a cause justifying the libellee in leaving the libellant.
3. But in cases based on personal indignities, etc., the adultery of the libellant is not, in itself, a defense, and cannot be set up as a justification.

Exceptions to answer in divorce.

The opinion of the court was delivered November 24, 1884, by

RICE, P. J.—The first exception is overruled, the answer having been sworn to by the respondent since the exception was filed. The third exception seems to be well taken. Under the act of March 13, 1815, sec. 7, P. D. 512, pl. 21, the adultery of the libellant is, in itself, a bar to a divorce only in cases where adultery is alleged as the cause for the divorce. In cases based on desertion the fact may be shown, not as, in itself, a bar, but as a cause justifying the libellee in leaving the libellant. In such a case the purpose and effect of the proof of the counter charge is to show that the desertion was not "willful and malicious." But where the desertion is proved to have been willful and malicious, the subsequent adultery of the libellant is no defense. (See *Ristine v. Ristine*, 4 Rawle, 460). The principles of the case cited are applicable here with equal if not with greater force. It follows that where the allegation of the libellant is that the libellee has offered such indignities to her person as to render her

condition intolerable, etc., and thereby forced her to withdraw from his house and family, and the allegation is denied, the allegation in the answer of the petitioner's adultery at divers times within the past two years, without in any way connecting it with the allegations of the petition is irrelevant. Clearly it is no bar to the divorce; and equally clearly it can be no justification for personal indignities.

Therefore, the third exception is sustained, the other exceptions are overruled.

Court of Common Pleas of Luzerne County.

GOLDSTEIN *et al.* *v.* SONDHEIM.

Attachment under act of 1869.

1. The effect of a dissolution of an attachment by the court is not to abate the action, but to release the goods attached, if manual seizure of them has been made by the sheriff, and to discharge the lien if the property is not capable of manual seizure, or if by judicial sale a fund has been substituted in place of the property.
2. It *seems* (but not decided) that the lien of an attachment, except as against other attachments, dates from the service of the writ, and not from its delivery to the sheriff.
3. But if by the face of the return no goods have been seized, and the attachment has no lien, a rule to dissolve is inappropriate and entirely unnecessary.
4. Evidence of fraudulent assignment considered.

Rule to dissolve attachment issued under act of 1869.

The opinion of the court was delivered December 20, 1884, by

RICE, P. J.—On February 20, 1884, four executions issued against the defendant, which were placed in the sheriff's hands on the same day at the same hour. By virtue of these writs the sheriff levied on the defendant's personal property in the borough of Hazleton, and on February 27, 1884, at 9 A. M., (according to his returns) sold the same for the aggregate sum of \$7,432.50. The sheriff further returned that he had distributed this fund as follows: To costs of sale \$101.81; paid into court, \$684.70; the residue to the four executions. This writ issued on February 27, 1884, and was received in the sheriff's office at 9 o'clock A.

M. On April 21, 1884, the defendant filed an affidavit denying the allegations of fraudulent assignment and fraudulent concealment of property contained in the plaintiffs' affidavit, and thereupon this rule was granted. Depositions have been taken to sustain and disprove the allegations of the affidavit upon which the writ issued. When this rule was granted no return had been made by the sheriff to the attachment, and on September 21, 1884, the plaintiffs ruled him to make return. His return is as follows: "That attachment was received in sheriff's office February 27, 1884, at 9 A. M., and was immediately sent by mail to sheriff at Hazleton, where a sheriff's sale of defendant's goods was advertised at 10 A. M. of said day, which sale was proceeded with, and before said attachment was received by the sheriff, all the defendant's property in sheriff's *baliwick* was disposed of under the sale aforesaid, so that defendant had no money, stocks, rights in action, evidences of debt, or other property which sheriff could attach, *non est inventus* as to defendant." The effect of the dissolution of an attachment by the court is not to abate the action, but to release the goods attached, if manual seizure of them has been made by the sheriff, and to discharge the lien, if the property attached is not capable of manual seizure, or if by a judicial sale of the property, subject to the lien of the attachment, a fund has been substituted in its place. The utmost effect of a dissolution of the attachment in the present case, would be to discharge the portion (if there be any) of the fund realized by the sheriff still undistributed, from its lien. But the defendant's counsel argues with great force, that by the sheriff's return the attachment has no lien—that the lien of an attachment, except as against other attachments, dates from the service of the writ, and not from its delivery to the sheriff. If this be so, the argument proves that the present rule is inappropriate and entirely unnecessary so far as the defendant's rights are concerned. For the court to solemnly decide that the attachment is not a lien upon the fund and then proceed to dissolve it for that reason only, would seem, under the circumstances, to involve an absurdity. How can we dissolve the lien of an attachment, when by the face of the return the attachment has no lien? The case of *Nebinzabl v. Saberlowitz*, 1 Luz. Leg. Reg. 595, is not in point.

The return in that case was held to be defective in that it did not specify what goods and chattels had been attached, but it did assert that the sheriff had attached the goods, chattels, and moneys in the hands of the garnishees. Hence, so long as the attachment was allowed to stand, the garnishees would have been justified in withholding payment of the money attached to the defendant. Here no such difficulty presents itself, if the defendant's theory is correct, for if an attachment does not acquire a lien until it is served, then the statement in the return that the writ came to the sheriff's office before the actual sale of the property amounts to nothing, and the conclusion of the return negatives the idea that anything was attached. These considerations have led us to the conclusion that we ought to dispose of the present rule as if no question of lien were involved, leaving that question to be decided in another and more appropriate form of procedure. By so doing the rights of all persons to be affected will be preserved. It is due to the counsel to call attention to the fact that when this rule was obtained the sheriff had not returned his writ. Looking now at the testimony we think there is enough evidence that these four judgments were confessed, not for the mere purpose of preferring those creditors, but for the purpose of assigning and disposing of his property, so as to place it beyond the reach of his creditors, to sustain an attachment as against the defendant. If his declarations, made but a few days before they were entered, are to be believed, the judgments in favor of F. Coran and Henry Sondheim were not supported by a good or valuable consideration, and he was then very heavily in debt to other creditors. The facts that they appear to have been confessed at the same and at a very recent time, though bearing different dates; that they are for very large amounts; that no satisfactory explanation is given by the defendant of the times when, and circumstances under which, the money was borrowed, or of what he did with the money; that the payees are his near relatives; together with many other circumstances which appear in the evidence, but which we have not mentioned, strengthen us in the conclusion that the plaintiffs' second allegation is sustained by the proofs now before the court.

The rule is discharged.

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Court of Common Pleas of Luzerne County.

COMMONWEALTH *ex rel.* v. PARRISH *et al.*

Cumulative voting.

1. Where the by-laws of a corporation provide for the election of a board of directors, seven in number, upon a day certain, the failure to choose a full board, because of a tie vote as to three candidates, will not vitiate the election of those who received a clear plurality of the votes cast.
2. In such a case the corporation may proceed to fill the vacancies caused by the tie votes at a stockholders' meeting, held upon due notice to the stockholders.
3. The system known as the "cumulative vote" does not alter the general rule that when, for any reason, there has been a failure to elect a full board of directors, it is the duty of the corporation to proceed with another ballot.

Suggestion for quo warranto and plea thereto.

The opinion of the court was delivered January 12, 1885, by

WOODWARD, J.—It has been agreed by counsel that this case may be considered and disposed of by us, as upon a case stated. In order to present clearly the precise questions which are to be passed upon, the following facts have been admitted:

First. The Wilkes-Barre Electric Light Company is a corporation created under, and by authority of, the act of assembly approved April 29, 1874, entitled "An Act to Provide for the Incorporation and Regulation of Certain Corporations," having its place of business at Wilkes-Barre, in Luzerne county.

Second. On December 3, 1884, at a special meeting of the stockholders of this corporation, an amendment to the by-laws was adopted, by which the number of directors who should thereafter govern the affairs of the corporation was increased from five to seven.

Third. On the same day the regular annual meeting of the stockholders of the corporation was duly convened, at which, agreeably to the by-laws, an election was held for seven directors, who should hold office during the ensuing year. At this election George H. Parrish received 205 votes, Isaac Long 205, Sheldon Reynolds 230, A. H. McClintock 222, H. A. Fuller 204, W. M. Miller 195, George R. Wright 187, W. J. Harvey 195, T. F. Ryman 195, the result being, that of the nine persons voted for, three, namely, Messrs. Ryman, Harvey and Miller, received 195 votes each. In other words, but five of the candidates received a plurality of the votes cast, and three of the candidates received a tie vote.

Fourth. Section 5 of the General Corporation Law of 1874, provides that directors shall be chosen annually by the stockholders at the time fixed by the by-laws, and shall hold their office until others are chosen and qualified in their stead. Section 8 of the by-laws provides that "the regular annual meeting of the stockholders shall be held on the first Wednesday of December in each year." Section 9 of the by-laws is as follows: "At the regular annual meeting of the stockholders, the judge or officer, being first duly sworn, shall hold an election by ballot for the purpose of choosing a board of directors. In such election each stockholder shall be entitled to one vote for each share of stock which may stand to his credit on the books of the company. He shall be entitled to cast one vote for each share of stock for each candidate for a director, or he may cast the whole number of his votes for one candidate, or distribute them on two or more candidates, as he may prefer, as provided in the 10th section of the act of April 29, 1874, P. L. 78, Pur. p. 1844, pl. 22; and the seven stockholders having the highest number of votes shall be declared duly elected to constitute the board of directors, who shall hold their offices for one year, or until their successors shall be elected."

Fifth. At the election in question it is admitted that certain of the relators, namely, H. A. Fuller, representing individually and by proxy twenty-four shares; B. Reynolds, representing individually twenty shares; H. Wright, representing individually five shares; and Sheldon Reynolds, representing individually twenty

shares, *cumulated* their votes. The remaining shares, one hundred and ninety-nine in number, were cast without cumulation. No adjourned or subsequent meeting appears to have been held, but the secretary made a minute or entry upon the books of the company which contained a tabulated statement of the vote cast by the stockholders.

Was the failure of the stockholders to choose a full board of seven directors at their annual meeting on December 3, 1884, such a non-compliance with the by-laws that the election is to be treated as a nullity, even as to those candidates who received a plurality of the votes cast? If, under other circumstances, the election as to the five candidates who received a plurality of the votes cast, might be good and valid, was the failure to provide for an adjourned meeting at which the vacancies could be filled, such an omission as to justify us in holding that no valid election was held? In the case of the Union Insurance Company reported in 22 Wend. 591, the act of incorporation provided for the election annually of twenty-three directors, a majority of whom were to constitute a quorum. At the particular election in question, only twenty-two persons were chosen as directors. It was held that the twenty-two were duly elected, and that a new election might be ordered to supply the one vacancy. In the matter of the Excelsior Insurance Company, 38 Bar. 297, it was decided that the neglect or refusal of stockholders to choose the full number of directors required by the charter, did not render the election illegal, but that those candidates who had a majority were to be considered elected, and that the vacancies were to be filled by the board as provided by the charter. The language of Ingham, P. J., is as follows: "No provision of the charter, and no law, compelled each stockholder to vote for the whole number of directors, and their refusal or neglect to vote for the whole number did not make the election illegal. Such as had a majority of the votes were elected. There may have been a tie vote as to some, which would prevent the election of the whole number, and yet it would not be contended, in such a case, that the election of those who had a majority was void on that account." We refer, also, to the case of the People v. Jones, 27 Wend. 81. It is contended, however, that the law of these

cases does not apply to the question now presented, for the reason that the cumulative method of voting requires the election of an entire ticket, or none. We have carefully considered the ingenious argument of the learned counsel for the respondents on this point, but find ourselves unable to agree with them. The object and aim of the cumulative vote, as shown by the reasoning of all the writers on the subject, is to protect the rights of minorities by permitting them to concentrate their voting force. It is not denied that in all cases of a tie vote (where the cumulative system does not prevail) the method of filling the vacancy caused by the tie, is to proceed to another ballot. We cannot see any good reason for holding that this rule, founded as it is in our universal practice, and approved as a fair and simple method, has been abrogated, or in any way restricted, by the introduction of the cumulative plan of exercising the right to vote. Our view of this question, as applied to the present case, is further approved by the fact that the five directors elected, constitute a majority and a quorum of the whole number. It remains to inquire whether the failure of the stockholders' meeting to reconvene at 3 o'clock on the day of the election, and their neglect to fix upon any specific time for an adjourned meeting, will preclude them from proceeding to fill the vacancies in the board until the next annual meeting? The general rule in regard to all corporations is, that the power to elect officers and preserve corporate organization is a necessary incident to corporate existence. In the case of municipal corporations it has been held that an election for municipal officers may be held after the charter day, and *mandamus* may be issued to compel the proper officers to give notice thereof. Dillon on Corporations, Vol. II., p. 768; Angell and Ames on Corporations, §124. In the case of Hicks v. The Town of Launceston, 1 Roll. Abridg. 512-514 referred to in People v. Runkle, 9 John, 157, it was held that though by a charter of incorporation the vacancy occasioned by the death or removal of an alderman, was to be supplied by an election within eight days thereafter, yet an election at any time afterwards was good, for the reason that the power of election was incident to the corporation. It is true that the act under which this company was organized provides, that "the directors

or trustees shall be chosen annually," it also provides that the time for holding the elections shall be fixed by the by-laws. It is probable that if this corporation had failed to hold any annual meeting at the time fixed by their by-laws, or if such meeting had neglected or refused to proceed with an election for directors, we should feel bound to hold that the old board remained in office for another year. But the meeting was held and an election for directors took place. There does not seem, to us, to have been in the failure to elect the full board, or to fix a precise time for an adjourned meeting, such a default as to render all that was done irregular and void. We refer in this connection to Angell and Ames on Corporations, §328, where it is said that "if the charter prescribe the mode in which by-laws shall be made and adopted, in order to their validity, that mode must be strictly pursued. But where the charter is silent upon these points * * the corporation may adopt by-laws as well by its own acts and conduct, and the acts and conduct of its officers, as by an express vote, or an adoption manifested by writing." (See also *Ponobscot R. R. Co. v. Dunn*, 39 Maine, 587).

Our conclusions are as follows: First. The election held December 3, 1884, was valid as to the five directors who received a plurality of all the votes cast, and as to the two additional directors required by the by-laws, there has been no election and a vacancy exists. Second. The vacancies thus existing in the board may be filled by the corporation at a meeting of the stockholders, to be held after due notice.

H. W. Palmer, for relators.

E. P. and J. V. Darling, for respondents.

Malcom Edwards Walker is a native of Waverly, Luzerne (now Lackawanna) county, Pa., where he was born April 8, 1847. He is a descendant of Thomas Walker, of Boston, Mass., who died July 2, 1659. Thomas Walker of Sudbury, Mass., was the son of Thomas Walker of Boston. He taught school at Sudbury in the year 1664, and in 1672 kept an ordinary. "His signature was very good. The town of Sudbury considered if

they would give Mr. Walker land as an encouragement to keep a free school in Sudbury." His wife, Mary, was a daughter of Daniel Stoner, of Billerica, formerly of Boston, and was fourteen years younger than her husband. She married a second time Captain John Goodenow, of Sudbury. She gave her son, William Walker, lands in Wells, Me., in 1715. Thomas Walker had ten children; five sons and five daughters. William Walker, the third son of Thomas Walker, was born in Sudbury July 22, 1666, and married, May 6, 1686, Sarah Goodenow, daughter of Captain John Goodenow. He taught school, and was a farmer in addition. He died in 1732. Thomas Walker, the third son of William Walker, was born in Sudbury August 15, 1689. He married Elizabeth Maynard June 16, 1717. They had three children, two sons and a daughter. Hezekiah Walker, son of Thomas Walker, was born in Sudbury in 1721, and married in 1738, Hannah Putnam, of Framingham, Mass., and had four children. Hezekiah Walker, son of Hezekiah Walker, was born February 25, 1747, in Holden, Mass., and died December 30, 1837. He married, in 1776, Lucy Raymond. She was born in 1755, and died January 21, 1849. For upwards of sixty-three years they trod life's pathway together, and were honored by the entire community as having lived without a stain or reproach on their names. They had twelve children, six boys and six girls, and upwards of eighty grandchildren at the time of their deaths. Of these children Joel Walker, of Oakland, Mass., eighty-seven years of age, and Eli Walker, of West Boylston, Mass., eighty-three years of age, still live, and are both physically and mentally healthy and vigorous. Of the others, one son lived to be upwards of ninety years, two daughters eighty-eight, one eighty-three, and the rest, with one exception who died at seventy-three, upwards of seventy-five years of age. Rev. John Walker, the grandfather of M. E. Walker, was the seventh child of Hezekiah Walker, and was born in Holden May 20, 1787, and died at Cold Brook Springs, Mass., August 18, 1866. He married Eunice Metcalf November 29, 1813. She died in 1870, aged eighty years. They had seven children, five sons and two daughters. One of the daughters died in infancy and the rest are still living, as follows: John, a florist, Worcester, Mass.; A. Judson, a Baptist minister, also the

inventor and patentee of the "hydraulic elevator," Warren, Mass.; William S., a Baptist clergyman, Newton, Mass.; Eunice M., Cold Brook Springs; Sylvia J., wife of Henry Wilder, a merchant and farmer at Hubbardston, Mass.; and Harvey D., teacher and also a Baptist clergyman, Huntington Mills, in this county. Rev. John Walker, until the age of twenty-one, worked on his father's farm, and at the age of twenty-five began preaching. For years he was the only Baptist minister in Holden, Princeton, West Boylston, Westminster, and Leominster, and in all these places reared vigorous churches, and converts were numbered by hundreds. He was the regular ordained pastor, during his ministry, of churches at Holden, Princeton, West Sutton, Barre, and Cold Brook Springs, being pastor of the latter place at the time of his death.

Prof. Harvey D. Walker, the father of M. E. Walker, is a son of Rev. John Walker, and was born at Princeton, Mass., April 20, 1817, and married Electa B. Bates, of Bellingham, Mass., April 2, 1844, and had four children, two boys and two girls, all of whom are living. At the age of ten years, while at work on the farm, Harvey D. formed this purpose, "that, cost what it might, he would go through college." To this his father gave no encouragement, so, working by day and studying by night, almost entirely without instruction, except what could be gained from the scanty text-books within his reach, he prepared himself to be a teacher, and at the age of sixteen, a boy weighing less than ninety pounds, commenced teaching in the public schools. The school numbered upwards of sixty, half of whom were older than their teacher. His success was such that after the public fund was expended the citizens of the district added six weeks to the term by subscription. For four successive years he taught school, working during vacation, his father receiving all his wages. At twenty his father allowed him the last year of his minority and he entered on the accomplishment of his long cherished purpose. With but a single suit of clothes and a handful of books, without a dollar, or a friend to whom he could look for aid, he commenced his studies and fitted himself for college. He entered Brown University in 1839, graduated with honor in 1843, and in 1846 the degree of A. M. was con-

ferred on him by his *alma mater*. Two days after graduation he became principal of the Milbury Academy, at Milbury, Mass., where he remained over two years, meeting with decided success. Among his pupils at this place whom he fitted for college were Hon. H. C. Rice, ex-governor of Massachusetts; Hon. S. P. Bates, LL. D., state historian of Pennsylvania, and former deputy state superintendent of public schools, Meadville, Pa. (a cousin of Mrs. H. D. Walker); and Bishop Willard R. Mallalieu, of the Methodist Episcopal church. In November, 1845, he removed to Abington Centre, Luzerne (now Waverly, Lackawanna), county, and on December, 1, 1845, he commenced his labors as principal of Madison Academy, and continued in that position for nearly eight years. Among those who received instruction at Madison Academy during this time were Garrick M. Harding, Alexander Farnham, D. L. Patrick, George R. Bedford, Jerome G. Miller, A. H. Winton, A. J. Smith, the late G. Byron Nicholson, and other members of the Luzerne bar. In October, 1853, he accepted the principalship of the preparatory department of Lewisburg University, and after the first year of his labors at this institution he taught a part of the Latin of the collegiate, and of the Greek of the theological, course. Among his students at this place were Thomas H. B. Lewis, W. H. Gearhart, and J. M. C. Ranck, members of this bar. In October, 1857, he moved to New Columbus, in this county, and organized the academy—which had then existed but a single year as a Normal School—under the name of the "New Columbus Normal Institute," and became its principal, and remained as such until December 30, 1861, when he moved to Orangeville, Columbia county, and commenced work as principal of the Orangeville Academy and Normal Institute, continuing as such until September, 1869. In 1864 he was induced by Thomas H. Burrows, then superintendent of public schools, and Governor Curtin to become interested in the establishment of the Soldiers' Orphans' Schools of Pennsylvania, and was commissioned as principal of the first Soldiers' Orphans' School established in Pennsylvania, although the second to go into operation owing to the necessary changes incidental thereto, and remained as such until its removal in June, 1868. In September, 1869, he became principal of the public schools of Bloomsburg,

and seven months later "professor of rhetoric and higher mathematics" in the Bloomsburg State Normal School. In October, 1871, he returned to Waverly and re-opened the Madison Academy (which he had left just eighteen years before), with its new buildings, as the Waverly Normal School, and commenced teaching the children of very many of his former pupils. In April, 1880, he located at Huntington Mills as principal of the Huntington Mills Academy and Normal School, and is still teaching there. Here, as at Waverly, he is instructing scores of the children of those who were his pupils at New Columbus and Orangeville. Although nearly sixty-eight years of age Professor Walker is as active physically and mentally as when in his teens. The wife of Rev. Harvey D. Walker is Electa B. Bates, a daughter of the late Otis Bates, of Bellingham, Mass. Lucias R. Bates, of West Boro, Mass., one of the largest manufacturers of straw goods in the United States, is her brother. Her sisters are R. T. Brown, widow of Rev. James Brown, late chaplain United States army, now living at Factoryville, Pa.; and Cynthia, wife of E. C. Craig, of Walpole, Mass.

M. E. Walker, at the age of fourteen, commenced assisting his father in the Orangeville school, and continued in that work until 1865, when he was appointed vice principal of the Orangeville Soldiers' Orphans' School, which position he held until 1868. In the latter year he commenced reading law with Samuel Knorr, of Bloomsburg, then assessor of internal revenue, and during 1869 and 1870 was a clerk in that office while prosecuting his studies. He was admitted to the bar of Columbia county December 6, 1870, and the next morning entered the public schools of Bloomsburg as a teacher. On April 1, 1871, he was appointed deputy postmaster of Bloomsburg, and continued to act as such until the fall of the same year, when, desiring to open an office, he resigned and commenced the practice of his profession. In December, 1871, Professor Henry Carver, principal of the Bloomsburg State Normal School, having left, and the faculty having been re-organized, George E. Elwell, then a teacher in the public schools, was elected one of the faculty. He tendered his resignation as teacher in the public school and the directors accepted it, provided M. E. Walker could be induced

to take his place; and thus from January 2 to June 1, 1872 he again taught school. On November 25, 1872, he removed to Shickshinny and opened an office, and has resided there since. He was admitted to the Luzerne bar January 6, 1873. On April, 8, 1873, he established the *Mountain Echo*, becoming its editor and proprietor, continuing as such until 1876, when he disposed of the same to R. M. Tubbs, the present editor. In September, 1873, he was asked by one of the directors of Bloomsburg to take the principalship of the schools of the West ward. Knowing that Professor Bates, of the Normal School, as well as a number of the older teachers of the public schools, were applicants for the position, he said to Mr. Ringler, the director, "give me twenty-five dollars a month more than any one else asks and I will come." Upon this idly spoken promise, and without any application in writing, as required by the board, Mr. Walker was elected principal and his salary fixed at seventy-five dollars per month, an advance of twenty-five dollars, and the term fixed at eight months. Mr. Walker, upon being notified of the action of the board, had a special meeting called to re-consider their action, as his paper and practice required all his time. But the board unanimously refused to release Mr. Walker from his promise, but agreed that when actually necessary he might leave his position for the purpose of attending to his legal matters in Luzerne county. Thus from October, 1873, till June, 1874, he taught school again, spending Saturdays at Shickshinny, and at least one day during each sitting of court at Wilkes-Barre, and daily, by mail, keeping up his paper. Since 1876 he has devoted his time exclusively to the practice of law, sandwiched since 1879 with the duties of justice of the peace. It is a remarkable fact that out of upwards of fifteen hundred cases acted upon by Mr. Walker but six appeals have been taken, one of them very recently; four of the other five have been tried and the judgment of the justice affirmed, and not a single certiorari to his records has ever been taken. In 1875 Mr. Walker was elected the burgess of the borough of Shickshinny. In politics he is a republican, and was a member of the county committee of that party for several years. He has been frequently a delegate to state and county conventions of his party. Mr. Walker married, May 13,

1873, Terressa A. Vannetta, daughter of Peter Vannetta, of Bloomsburg. She was for ten consecutive years prior to her marriage principal of the primary department of the public schools of Bloomsburg. They have three children living, Harvey Day Walker, Warren Woodward Walker, and Harry Malcom Walker. While Mr. Walker is not a member of any temperance organization, he has never yet tasted a drop of any intoxicating liquors, domestic wine, or beer, and has never used tobacco in any form.

It is scarcely necessary to add to the relation of the foregoing facts that Mr. Walker is a man of much energy and perseverance, and a useful man in the community in which he resides. Taking example from his ancestry, he sets before him the objects to be attained and pursues his course to the ends thus marked out undeviatingly, and undeterred by any obstacles that intelligent effort can be made to overcome. That he is appreciated by his neighbors and fellow-citizens is also sufficiently attested. His practice is a large one proportioned to the territory from which it is drawn, and larger far than that of many of his more pretentious professional brethren abiding in more pretentious communities. That he is able to give it attention and at the same time not neglect his duties as a justice, of itself argues a willingness to work, and an ability to work, that, joined together, must needs make substantial headway in the world.

Michael Cannon was born March 22, 1844, at Inniskeel, in the county of Donegal, Ireland, and was less than a year old when his parents came to this country. His father, who is still living, is James Cannon, an early settler at Summit Hill, Carbon county, Pa., having located there in 1832. He resided there until 1840, when he returned to Ireland and married Rosa, a daughter of Hugh McAloon, who is the mother of the subject of our sketch. Mr. Cannon subsequently returned to this country and has resided at Summit Hill and Hazleton ever since. Michael Cannon was educated in the public schools, and subsequently became a teacher in the borough of Hazleton and in this

city, studying law in the meanwhile in the office of the late David R. Randall and Michael Reagan, of this city. He was admitted to the Luzerne county bar January 25, 1873. In January, 1865, Mr. Cannon enlisted in the United States Navy, doing duty on the monitor steamer *Canonicus*, and was at the storming of Fort Fisher. He married, November 25, 1873, Nettie McDonald, youngest daughter of the late Patrick McDonald, of Union township, Luzerne county, Pa. Mr. and Mrs. Cannon have four children; Nettie Cannon, Stella Cannon, Laura Cannon, and Edna Cannon. Mr. Cannon, it will be observed, is another of the numerous class of attorneys who began active life in the school-room. He is a representative, also, of those who have got along in the world without other education than that the common schools afford. The disadvantage arising from lack of college or university training is often more than compensated by the spirit of independent self-reliance that has its birth and growth in those exigencies that come with dependence upon our own energies for a livelihood. Mr. Cannon was a worker as well as a teacher, and in the latter capacity achieved an enviable reputation, as those who knew him and had opportunity of judging his qualifications and estimating the results of his effort at the time, freely attest. His enlistment in the nation's service when he was not yet quite of age, brought him experiences which have, doubtless, been valuable to him in later life. In the practice of his profession Mr. Cannon is noted among his brethren for both application and energy, qualities that are certain to unlock the repositories of the legal knowledge necessary for the successful prosecution of a client's cause. He is a democrat in politics and a fair orator, and has been frequently called to effective service on the stump in his party's behalf.

John Alfred Opp was born near Muncy, Lycoming county, Pa., July 15, 1847. He was educated in the public schools and at Dickinson Seminary, Williamsport, Pa., graduating from the latter institution in 1870. On July 4, 1863, during the late civil war, he enlisted in Company E Thirty-Seventh regiment Pennsyl-

vania Militia, and remained in the service about one month, when the regiment was mustered out of service. In January, 1864, Mr. Opp enlisted in Company D, Eightieth regiment (Seventh cavalry) Pennsylvania Volunteers, and the regiment was mustered out of the service August 23, 1865, at Macon, Ga. After the war Mr. Opp was a teacher in the public schools in Muncy Creek township, Lycoming county, and in Plymouth, in this county. For the last five years he has been one of the directors of the public schools of the borough of Plymouth, where he resides. He studied law with E. H. Little, of Bloomsburg, Pa., and was admitted to the bar of Columbia county, February 1, 1873, and to the Luzerne bar February 24, 1873. The father of John A. Opp is Thomas Jefferson Opp, a native of Lycoming county. His grandfather, John Opp, was a native of Columbia county, and was one of the early settlers of Muncy, Pa. The mother of the subject of our sketch was Keziah Schuyler, daughter of the late Adam Schuyler, of Paradise township, Northumberland county, Pa. Mr. Opp married, October 12, 1880, Helen Wier, daughter of Andrew Wier, of Plymouth, Pa. Mr. Wier is a native of Scotland. Mr. and Mrs. Opp have a family of two children, John Howard Opp and Elizabeth Opp. Mr. Opp is a trustee in the First Presbyterian church of Plymouth, and is a director in the Plymouth Gas Company, and also in the Plymouth Water Company. He has held the position of judge advocate in the National Guard of Pennsylvania with the rank of major. It is no small praise to say of an American citizen that he was a brave and dutiful soldier in the years when the life of the nation trembled in the balance and there was call for every stout heart at the front. Such praise is Mr. Opp's due. The regiments in which he served did effective service, and in every engagement in which they were concerned during his term he had part and bore himself with conspicuous gallantry. It was of the young men of the country that the fervor of the army was constituted, and the good names they earned fighting for union are a rich heritage to be bequeathed to their children. As a teacher he was painstaking and uniformly successful, winning golden encomiums from directors, scholars, and parents. That his interest in the subject of education did not cease with his retirement from

the school-room, is shown in his active service since as a director, to which he has devoted much time and brought ideas and energies that have redounded greatly to the benefit of the schools. Mr. Opp is a generally bright man, and has already achieved a good standing in his profession. Few young men have had a greater degree of success in the same time, and fewer still can look forward to a bright future as hopefully. He is well read outside of the law, and this, added to his many other companionable qualities, make him gratifyingly popular in the social circle.

John Trittle Luther Sahn is a native of Greencastle, Franklin county, Pa., where he was born September 6, 1843. He is a descendant of an early German settler who came to Pennsylvania at a very early period in its history. His grandfather, John Sahn, was a native of the neighborhood of Manheim, Lancaster county, Pa., and was a farmer and distiller. He left to survive him seven children, two of whom became ministers of the gospel, as follows: Rev. Abram Sahn, a Methodist Episcopal minister, and Rev. Peter Sahn, D. D., a Lutheran minister. The latter was the father of the subject of our sketch. He was born near Manheim in 1809, and educated at the Lutheran Theological Seminary, Gettysburg, Pa., and graduated in the class of 1831. He commenced his ministerial labors in 1832, and had been engaged in the work of the ministry about forty-four years at the time of his death. He was endowed with more than ordinary natural talent, and his mind was well disciplined by education. He was a diligent student, and became a thorough theologian. He had acquired an accurate acquaintance with the German as well as the English language, and preached equally well in both. He was a homilectician and prepared his sermons carefully and systematically. His strength in the pulpit consisted more in the clearness and logical connection of the matter than in the ornament and beauty of his style. He was solid and instructive, as well as an impressive and successful preacher. As a pastor he was diligent and faithful. He was humble and modest in his bearing, quiet and retiring in his intercourse with his fellow-

men, but in his consistency and devotion to the cause of Christ he exerted a positive and wide-spread influence over the members of his church and the community among whom he labored as a Christian minister. Although strongly attached to the Lutheran church he, nevertheless, fraternized with Christians of other evangelical denominations, and spent his last Sabbath morning on earth in participating in the exercises of the dedication of the Reformed church, at Laurelton, Pa. He served the following charges in the order named: Maytown, Middletown, St. Thomas, Greencastle, Blairsville, Johnstown, Indiana, Friedensburg, Loysville, Aaronsburg, and New Berlin. He died at Laurelton, Union county, Pa., March 14, 1876, aged sixty-six years. His remains are interred in the cemetery at New Berlin, Pa. He left five children to survive him, among whom in addition to the subject of our sketch, is Theophilus H. T. Sahn, a lawyer at Hamburg, Ia.; W. K. T. Sahn, a physician at McCoysville, Pa.; and M. O. T. Sahn, a Lutheran minister in Lawrence county, Pa. The wife of Rev. Dr. Sahn is Susan Tritle, daughter of the late John Tritle, of Guilford, Franklin county, Pa. He was a farmer and spent a long life on the old homestead near Chambersburg, Pa. He was a man of industrious habits, and a devout Christian, and for many years an elder in the Lutheran church. His father, Jacob Tritle, was a farmer and distiller, and was a native of Bavaria, and on his arrival in this country settled in Franklin county. Jacob Benedict, M. D., and Daniel Benedict, M. D., well-known physicians in the lower part of the state, are grandsons of Jacob Tritle, as is, also, Rev. Frederick Benedict, a Lutheran minister. Frederick A. Tritle, also a grandson, is a prominent lawyer, and is now governor of Arizona Territory.

J. T. L. Sahn was prepared for college at Somerset Academy and in a select school taught by Silas M. Clark, now one of the judges of the Supreme Court of Pennsylvania. He then entered the Pennsylvania College, at Gettysburg, Pa., from which he graduated in 1862. He read law with B. McIntyre at New Bloomfield, Pa., and was admitted to the Perry county bar in April, 1865. He then removed to Mifflintown, Pa., and in 1866 was elected district attorney of Juniata county for three years. Upon the expiration of his term he entered into a legal partner-

ship with Ezra D. Parker, under the firm name of Parker & Sahm. This partnership continued until 1873, when Mr. Sahm removed to this city. He was admitted to the Luzerne county bar April 23, 1873. In December of the same year he became a clerk in the prothonotary's office, and has continued in that position until the present time. He has been chief deputy prothonotary since January 1880. It speaks well of Mr. Sahm to say that although a democrat in politics he has retained his position under all administrations of the office for the past eleven years and over. Mr. Sahm married, September 17, 1872, Minnie S. Rothrock, a daughter of Joseph Rothrock, of Fermanagh, Juniata county, Pa. Mr. and Mrs. Sahm have four children living, Frank Basil Rothrock Sahm, Raymond Paul Rothrock Sahm, Ruth Victoria Rothrock Sahm, and Minnie Constance Rothrock Sahm. Every here and there through the country are to be found men who have been bred to the law, but have drifted from its active practice into positions in which their professional training constitutes one of the chief elements of their usefulness. Mr. Sahm is one of this number. He has become a fixture in the office of the prothonotary of the county, where his knowledge of the principles of the law and familiarity with the statutes enable him to perform the duties assigned him with a rapidity and safety that could not be otherwise attained. Every member of the Luzerne bar will bear cheerful witness to this fact, and will admit his obligations for the assistance it has been to him in that part of his practice which brings him into contact with the prothonotary's office. In addition to this exceptional fitness Mr. Sahm is possessed of a most obliging disposition. He is never either too busy or too tired to give prompt attention to the demands of the profession upon his assistance. His memory is a storehouse rich in important information relative to the general business of a prothonotary's office, and the books and records of this particular prothonotary's office, and he is never known to hesitate to unlock it for the convenience of his professional brethren. Whether or not he will ever go back again to active practice he is uncertain, but if he should the knowledge he has acquired in his present position ought, of itself, to insure him a paying clientage.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, JANUARY 30, 1885.

No. 5

Court of Common Pleas of Luzerne County.

FIDELITY CASUALTY COMPANY *v.* KETRICK *et ux.*

Certiorari—Parol evidence—Foreign insurance company—Service of summons.

1. It appeared by uncontradicted evidence that after the rendition of judgment a material and apparently unauthorized alteration was made in the constable's return. *Held*, that this destroyed its conclusiveness as evidence of the manner of service, and that, consequently, evidence as to the actual mode of service was competent for the purpose of showing that the justice did not have jurisdiction of the defendant in fact or by legal presumption.
2. General rule as to admission of evidence to impeach the record of a justice of the peace on certiorari considered.
3. Service of summons upon foreign insurance company must be made on the duly designated agent, if the company has one.

Certiorari.

The opinion of the court was delivered January 5, 1885, by

RICE, P. J.—This was an action of debt in which the plaintiffs (below) claimed to recover from the defendant (below) the sum of \$250 "on an insurance policy issued by said defendant company and payable to plaintiffs." Judgment by default was entered in favor of the plaintiffs for the amount of their claim. Taking the whole record together it appears with sufficient certainty that judgment was entered after a hearing had between the hours when the summons was returnable. Therefore the case does not come within the decisions cited upon this point. The principal exceptions are directed against the service of the summons. The return on the back of the summons is as follows: "Served this writ on the within named defendant * * * personally by producing to Jacob Brant, general agent, *commissioned*, the original, and informing him of the contests thereof, also by leaving

with him a true and attested copy at their office, in presence of Jacob Brant, general agent, *commissioned*." We have italicized the word "commissioned" because the uncontradicted parol testimony of Mr. Nichols, the defendants' attorney, is, that four or five days after judgment had been rendered he carefully examined the return—the record not having been made up—and that at that time the word "commissioned" was not in it. The deposition of Mr. Brant, taken under objection, is also submitted to us, in which he states that he is the agent of the company in its plate glass department, but has no authority to represent it in its accident department; and the certificate of the insurance commissioner is produced which shows that the defendant company "located at New York, in the state of New York, has appointed George P. Zieber, of Reading, as its agent and attorney in this state, on whom process of law can be served." It must be conceded that the summons was not served as required by law. If it be assumed that this is a domestic insurance company, the service cannot be sustained under sec. 6 of the act of April 8, 1851, P. L. 354, P. D. 287, pl. 31, for that section has been held to apply to foreign insurance companies only; and it cannot be sustained under sec. 41 of the act of June 13, 1836, P. L. 579, P. D. 286, pl. 25, for it does not purport to have been made on any of the persons mentioned in that section. *Cochran v. Library Company*, 6 Phil. 492; *O'Haro v. Mut. Aid Soc.* 2 Kulp, 269. Neither was the service legal as against a foreign insurance company. The act of June 20, 1883, P. L. 134, is explicit in directing how, and upon whom, process shall be served in actions against foreign insurance companies doing business or having agencies in this state, and removes some of the difficulties in the way of such service which were not provided for in the act of April 4, 1873, P. L. 20. But even under the act of 1873 it was decided that service must be made on the duly designated agent, if the company has one. *Liblong v. Kansas Fire Ins. Co.* 1 Nor. 413. But, says the plaintiff's counsel, the return is conclusive, and the court on certiorari cannot receive evidence to show that it is untrue. This is the general rule, and, if the offer were simply to show that the writ was not served in the manner specified in the return, the rule would be applicable here. *Benwood Iron Works v. Hutchinson*,

§ Out. 359. This rule will, in general, work no hardship. The officer makes his return under oath and upon his official responsibility, and if it is false the party aggrieved has his remedy. But when it is shown that the return of record is not the one which the constable made, no such conclusiveness can attach to it, and when once the conclusiveness of the return as evidence of the manner of service is destroyed, it is then competent, as affecting the question of jurisdiction, to show that the writ was not served according to law. Is, then, the parol evidence of the alteration of the constable's return after the rendition of judgment, competent? We think it is. The general rule is, that upon certiorari the record cannot be impeached by extraneous evidence, but this rule has several well-known exceptions. Where it is necessary to prevent injustice, the court may receive evidence to show that the magistrate acted partially, fraudulently, or corruptly; that he did not have jurisdiction, or that he made up a false record. *Shell v. McConnell*, 1 Pears. 27; the *O. & B. R. R. Co. v. Brittain*, 1 Pitts. R. 271; *Knight v. Perry*, 1 Ash. 221; *Warren v. Wells*, 3 Luz. Leg. Reg. 111; *McMullan v. Orr*, 8 Phil. 342; *Youngblood v. Falkner*, 2 Kulp, 429; *Lacock v. White*, 7 H. 495; *Van Why v. Burgunder*, 13 Luz. Leg. Reg. 435. No plainer case can be imagined for this departure from the general rule, than where, after judgment has been rendered against a defendant by default, a material and unauthorized alteration is made in the constable's return. The evidence upon this point affects, not only the question of jurisdiction, but the defendants' remedy. It is no answer to say to him in such a case "the return is conclusive, but if false you may sue the constable," for, under the evidence, this is not the constable's return. His liability to the defendant depends on the return as he made it. If true in fact but insufficient in law as he made it, and false in fact but sufficient in law as subsequently altered, the defendant's remedy by action against him would be valueless. Again, the remedy by appeal is gone—the remedy by certiorari having been chosen on the faith of the return as it originally appeared—and it is now too late for the defendant to retrace its steps. If, therefore, the alteration of the return cannot be shown in this court upon review of the proceedings, we know not what remedy the defendant

would have. Some of the cases which we have read suggest that the justice may permit the constable to amend his return, but this question does not arise here. This was not, so far as the record shows, the exercise of a supposed power of amendment. The officer is responsible for the truth of his return, and it cannot be amended for him without his consent. *W.-B. B. and S. Asso. v. Zeis*, 1 Kulp, 153. No application or consent of the constable to amend appear on the record, and they are not to be presumed. We are not to be understood by what we have said to impute any intentional fraud; we simply decide that there was, under the uncontradicted evidence, a material and apparently unauthorized alteration in the constable's return after the rendition of judgment; that this destroys its conclusiveness as evidence of the manner of service, and that, consequently, the evidence submitted as to the actual mode of service is competent for the purpose of showing that the alderman did not have jurisdiction of the defendant in fact or by legal presumption. In reversing the judgment we call attention again to the act of 1883, *supra*, as pointing out the mode of service in any new suit to be brought.

The judgment is reversed.

F. M. Nichols, Esq., for plaintiff in error.

J. T. Lenahan, Esq., for defendants in error.

There are two old methods of paying rent in Scotland—kane and carriages; the one being rent in kind from the farm-yard, the other being an obligation to furnish the landlord with a certain amount of carriage, or rather cartage. In one of the vexed cases of domicile, which had found its way into the house of lords, a Scotch lawyer argued that a landed gentleman had shown his determination to abandon his residence in Scotland by having given up his "kane and carriages." It is said that the argument went further than he expected—the English lawyers admitting that it was indeed very strong evidence of an intended change of domicile when the laird not only ceased to keep a carriage, but actually divested himself of his walking-cane.

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FRIDAY, FEBRUARY 6, 1885.

No. 6

Court of Common Pleas of Luzerne County.

MATTHIAS v. ZEARFOSS.

Practice—Power of attorney to enter discontinuance—Compromise of suit.

- 1 The Settlement of cases by the parties is to be favored; and where such settlement has been fairly entered into one party will not be assisted in withdrawing from it, or in re-opening the litigation.
- 2 Where a discontinuance is entered by an attorney pursuant to, though some time subsequent to, a written agreement settling the case, the court ought not to disturb it without the most convincing proof of a revocation of the attorney's power, or some evidence, at least, impeaching the fairness or validity of the settlement.

Rule to show cause why the entry of discontinuance shall not be stricken off and judgment entered for want of a plea.

The opinion of the court was delivered January 26, 1885, by

RICE, P. J.—If the implied power of the attorney of record to act for the plaintiff were the only question involved, the doubt created by the conflicting evidence as to the existence of the relation of attorney and client at the time the discontinuance was entered, would make it a proper case for the exercise of the discretionary power of the court to strike it off. Where it is admitted that the attorney of record was dismissed before entering a discontinuance of a case, or even where the fact is involved in some doubt, but there are no other superior rights or equities involved, it would be in accordance with the practice of the courts in analogous cases to afford relief to the suitor in the case itself, instead of compelling him to begin *de novo*, or to resort to an action against the attorney for his unauthorized act. But if, according to the undisputed facts, the discontinuance was entered pursuant to a written agreement of the parties settling the case, the court ought not to disturb it without the most convincing proof of a revocation of the attorney's power, or some evidence, at least,

impeaching the fairness or validity of the settlement. In the present case there was such an agreement, entered into in November, 1880, which, so far as appears, the defendant has been carrying out to the present time. At the time this agreement was made Mr. Butler was the plaintiff's attorney. He testified as follows: "The discontinuance of that suit was in pursuance of this contract, by reason of it, and because at the time the contract of settlement was acknowledged and delivered I agreed with Barnett Zearfoss, in presence of Matthias, to enter a discontinuance of that suit. I explained it to them how I was to do it." The plaintiff, in urging the present motion makes no attack whatever upon the compromise agreement. He does not allege either fraud or mistake in its execution, nor failure of the defendant to carry out his part of the same. Arguing that these matters would be irrelevant to the present inquiry, his contention is that he had dismissed Mr. Butler as his attorney before the discontinuance was actually entered, and, therefore, it should be stricken off, and the defendant be compelled to set up the agreement of settlement as a defense to the action. As to this last question of fact the evidence is conflicting, but I discover no contradiction of the testimony of Mr. Butler above quoted. As we have already suggested, this is an appeal to the discretionary power of the court; its object is to prevent injustice, and, therefore, I cannot agree with the counsel representing the rule that the undisputed facts above stated ought not to be considered. The settlement of cases by the parties is to be favored, and where such settlement has been fairly entered into, one party will not be assisted in withdrawing from it, or in re-opening the litigation. Indeed, it has been held that the court will compel a specific execution of agreements concerning suits depending before them. In one case, which seems to be in point, the plaintiff agreed to discontinue in consideration that the defendant would not file a bill against him, and, the latter having performed his engagement, the court stayed proceedings in the suit and ordered an *exoneratur* of the bail. *Wilkins v. Burr*, 6 Binn. 389. It would not be straining the principle of that decision to hold here that the agreement that Mr. Butler should enter a discontinuance of the case was irrevocable by the plaintiff. Be that as it may, we

conclude, that, under all the circumstances of this case, there being no evidence whatever, as the case is now presented, bringing the fairness and validity of the compromise into question, and the evidence as to the fact of the attorney's dismissal and the consequent revocation of his authority to act being in serious conflict, the court should not interfere, but should leave the parties to their other remedies.

The rule is discharged.

Agib Ricketts, for plaintiff.

A. R. Brundage and J. V. Darling, for defendant.

Court of Common Pleas of Luzerne County.

COMMONWEALTH *ex rel.* v. NORTON *et al.*

Mandamus—Practice—Township treasurer—Approval of bond.

1. On the hearing of a rule to show cause why a mandamus should not issue, the only question is, whether the petition discloses sufficient ground for the allowance of the writ.
2. An answer is not required until the alternative writ has been allowed and issued. Depositions in denial of the facts therein alleged cannot be considered. Unless it admits the material allegations of the petition it should be met by demurer, plea, or traverse, and an issue should be thus formed upon which judgment can be rendered. If it be an issue of fact it goes to a jury.
3. A township treasurer is not entitled to demand that the township funds shall be paid over to him before giving bond "to the satisfaction of the supervisors."
4. The supervisors are the tribunal to decide as to the sufficiency of the bond. If they refuse to act in the matter at all the court, by mandamus, may compel them to act, but cannot compel them to adopt the judgment of the court as to the sufficiency of the bond in preference to their own.

Rule to show cause why an alternative writ of mandamus should not issue commanding the respondents to pay over to the said relator, as township treasurer, all moneys collected, or to be collected, by them as supervisors of said township.

The opinion of the court was delivered June 23, 1884, by

RICE, P. J.—On the hearing of a rule to show cause why a mandamus should not issue, all the material allegations of the petition are assumed to be true, and the only question is, whether the petition discloses sufficient ground for the allowance of the writ. Regularly an answer is not required until the alternative writ has been allowed and issued, and when the return or answer

is filed, depositions in denial of the facts therein alleged cannot be considered, but regularly; unless it admits the material allegations of the petition, it should be met by a demurer, plea, or traverse and an issue should thus be formed upon which judgment can be given. If it be an issue of fact it goes to a jury like any other issue. From the way in which this case is presented to us we presume that these formalities are waived, and that the parties desire a disposition of the main question in controversy. As the case now stands, the bond of the relator has not been approved by the township supervisors. Is he entitled to demand that the township funds shall be placed in his hands before having given bond to their satisfaction? We think not. Act April 15, 1834, P. L. 555, P. D. 1403, pl. 24; and see, also, *Howell v. Com.* 1 Out. 332. But it is alleged that he tendered a bond for their approval, and that they refused to approve it. In their answer the supervisors do not question his title to the office, but say that the bond tendered was defective in several specified particulars; that when he presents a bond which, in their judgment, meets the requirements of the law, they will approve it; or, that if, in the opinion of the court, the bond first tendered is sufficient and meets the requirements of the law, they will approve it. We assume that this answer is made in good faith, and from an inspection of a copy of the bond we are not prepared to say that the objections made to it are frivolous. But even if we thought that they were not well founded, we would have no right to substitute our discretion for theirs and command them to do an act of this nature which their judgment condemned. The statute directs the treasurer to give a bond "to the satisfaction of the supervisors." They are, therefore, the tribunal to judge and decide as to its sufficiency. If they refuse to act in the matter at all, the court, by its mandamus, may compel them to act, but cannot compel them to adopt the judgment of the court as to the sufficiency of the bond in preference to their own. The rule governing cases of this kind may be stated as follows: "Where a person or body is clothed with judicial, deliberative, or discretionary powers, and he or it has exercised such powers according to his or its discretion, mandamus will not lie to compel a modification or revision of the decision resulting from the exercise of

such discretion, though in fact the decision may be wrong." Runkle v. Com. 1 Out. 328. According to the answer, the respondents having declined to approve the first bond in the exercise of the discretion which the law confers upon them, there would now seem to be no obstacle in the way to prevent their action upon the bond which was tendered after the filing of the answer. But, as that is a matter which has arisen since the filing of the answer, and as the evidence taken upon depositions relating to it is objected to, it is not now properly before the court. As the case is presented at this time on petition and answer the writ must be refused.

The rule is discharged.

M. Cannon, Esq., for relator.

John S. Harding, Esq., for respondents.

Court of Common Pleas of Luzerne County.

JENKINS v. JENKINS. *

Certiorari.

* Where the alderman had jurisdiction of the cause of action his decision as to the liability of the defendant cannot be reversed on certiorari by referring to the testimony taken before him; for, although sent up by him, it is not part of the record.

† An action based on the defendant's failure or refusal to perform his contract, and not on negligence in the performance of a duty implied by that contract, is within the jurisdiction of a justice of the peace.

Certiorari.

The opinion of the court was delivered December 20, 1884, by

RICE, P. J.—The first three exceptions attack the validity of the contract, for the breach of which this action was brought. But if the alderman had jurisdiction of the cause of action, his decision as to the liability of the defendants below on the contract cannot be reversed on certiorari by referring to the testimony which was taken before him; for, although sent up by him, it is no part of the record. The fourth exception is, that

the action should have been in case, and, therefore, the alderman did not have jurisdiction. The record shows that the action was brought to recover damages for the breach of contract, and was, therefore, apparently within his jurisdiction. But even if we refer to the evidence given before the justice, we see that the plaintiff's demand was based on the defendant's failure or refusal to perform their contract, and not on negligence in the performance of a duty implied by that contract. This question of jurisdiction was considered in *Klinetob v. Roth*, 2 Kulp, 393. There being no other exceptions

The judgment is affirmed.

T. R. Martin, for plaintiff in error.

Court of Quarter Sessions of Luzerne County.

COMMONWEALTH v. OWENS.

Where it appears on the face of an indictment that the offense charged is barred by the statute of limitations, the indictment may be quashed, and cannot be amended so as to bring the case within the time when the offense can be prosecuted.

Motion to quash indictment.

The opinion of the court was delivered October 31, 1884, by

RICE, P. J.—Where it appears on the face of an indictment that the prosecution of the offense charged is barred by the statute of limitations, the indictment may be quashed. *Com. v. Bartilson et al.* 4 Nor. 482. In *Com. v. Seymour*, 2 Brewst. 567, it was held that our act allowing amendments does not extend to this case. The same has several times been held in this court, although we can refer to no reported case. After a careful re-examination of the question we conclude that we have no authority to make the amendment so as to bring the case within the time when the offense can be prosecuted.

The motion is allowed and the indictment quashed.

John McGahren, for plaintiff.

Q. A. Gates, for defendant.

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Court of Common Pleas of Luzerne County.

TUGGLE v. LEATH, *et ux.*

1. The coverture of the defendant in an action upon her personal undertaking, (according to the law of the state of Virginia) is not a fact affecting the jurisdiction of the court, and hence in a suit in this state upon a judgment obtained in the Virginia court the evidence of that fact is incompetent and irrelevant.
2. Conclusiveness of the judgments of a sister state considered.

Exceptions to decision of court.

The opinion of the court was delivered January 26, 1885, by

RICE, P. J.—This was an action of debt began by foreign attachment upon the record of a judgment of the Circuit Court of Nottaway county, in the state of Virginia. M. A. Leath pleaded "*nul tiel record*, and that the court whose judgment is attempted to be exemplified had no jurisdiction of the said Margaret A. Leath, because of her coverture." The case was tried in this court on these pleas without a jury, under the act of April 22, 1874, P. L. 109. The judgment sued on was entered in default of appearance and plea in an action of debt founded on the sealed promissory note of the above named defendants. The record is silent as to the coverture or non-coverture of M. A. Leath, at the time the note was executed and the judgment entered. In rendering our decision the following conclusion of law was stated: "That it is incompetent in this action to impeach the validity of the judgment by evidence outside the record of the coverture of M. A. Leath at the time of the execution of the note." We accordingly decided that the plaintiff was entitled to recover. The exception to the foregoing conclusion raises the important questions in the case:

First. The evidence referred to was competent, provided its effect would have been to prove that the Virginia court did not, in point of fact, have jurisdiction of the parties, or of the subject matter of the action. The law upon this subject is now well settled. Mr. Justice Bradley, delivering the opinion of the Supreme Court of the United States, after an elaborate review of the authorities, thus concludes: "On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the fourth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record itself." *Thompson v. Whitman*, 18 Wall. 457-469. Accordingly it was held in *Knowles v. Gas Light and Coke Co.* 19 Wall. 58, to be competent for the defendant to show that he was not served with summons, notwithstanding the record in suit showed a return of personal service. In *Hill v. Mendenhall*, 21 Wall. 454, extrinsic evidence to contradict the record was held to be inadmissible under the plea of *nul tiel record*, but it was at the same time held that where its effect would be to prove that, in point of fact, the court rendering the judgment did not have jurisdiction, the evidence would be admissible under a proper plea. These decisions, construing the constitutional provision and the act of congress of 1790, are of binding authority in the courts of this state, and have been so recognized. (See *Guthrie v. Lowry*, 3 Nor. 533.) Whatever may have been said in *Wetherill v. Stillman*, 15 Sm. 105, and other earlier cases as to the conclusiveness of averments of jurisdictional facts contained in the record itself must, of course, give way.

Second. But there is a wide difference between proof of a fact which would show that the court did not have jurisdiction and evidence that the judgment was irregular or erroneous. We may examine the law of the sister state to ascertain the jurisdiction of the court rendering the judgment, and may decide accordingly, even though such decision may have the effect of contradicting the implied adjudication of that court in the particular case upon the same question. But where the law concerning the jurisdiction, whether unwritten or statutory, is once ascertained, the inquiry can go no farther. (See *Colt v. Colt*, 111

U. S. 566; *Thompson Oil Co. v. Noble*, 29 Sm. 354; *Guthrie v. Lowry*, 3 Nor. 533.) The question is, then, whether the coverture of the defendant, in an action upon her personal undertaking, is a fact affecting the jurisdiction of the court, or only a fact affecting the validity of the contract sued upon? If it is the former, then the evidence was competent; but if it is the latter, then it was not.

Were this question to be decided according to the common law principles as declared by the courts of Pennsylvania, we, perhaps, would be justified in concluding that the disability of coverture affects, not only the power of a married woman to bind herself by contract, such as this, but also the jurisdiction of a court of law to enforce such a contract by legal process. According to the decisions in *Hecker v. Haak*, 7 Nor. 238; *Hugus v. Dithridge Glass Co.* 15 Nor. 160; and *Vandyke v. Welles*, 7 Out. 60, a judgment against her by default on such a contract would seem to be a nullity. (See also *Swayne v. Lyon*, 17 Sm., 439, 441.) But however this may be, it must be remembered in the present case, that the cause of action was a Virginia contract, that the defendant was a resident of that state, that she was sued in a court of general and not special or limited jurisdiction, and that the process was personally served upon her. Therefore the law of the state of Virginia defining the jurisdiction of that court over such a cause of action, is to control, even though it may be in conflict with our own. Otherwise we would deny to the judgment of a sister state that "faith and credit" which it has "by law or usage in the courts of the state" from whence it came. Recognizing this principle the defendant undertook to prove the law of the state of Virginia by the testimony of a member of the legal profession of that state. While we might take notice of the law of Virginia without proof, (*Baxley v. Linah*, 4 H. 241; *Hinchman v. State*, 3 C. 479,) we are compelled by the circumstances of the case to rely on the testimony offered in so far as it undertakes to give the law pertinent to the question of jurisdiction as there held; but in so far as the witness undertakes to give an opinion as to what pleas and evidence ought to be admitted to defeat the judgment in the present action, his testimony is incompetent. That question does not relate to the law of Virginia, but to the faith and credit to be given the judgment in this state,

and is to be decided by the constitutional provision and act of congress as construed by the Supreme Court of the United States, and the courts of our own state. After a very careful re-examination of the testimony of this witness we are unable to come to a different conclusion from that reached in our former decision. According to the law of Virginia proof of the defendant's coverture would have been a complete defence to the original action, so far as it concerned her, for the reason that her contract is void in law. It might possibly be said that no court has jurisdiction—using that term in a very broad sense—to enter a judgment which the law and the evidence do not warrant, as for example, a judgment in favor of the plaintiff upon a void contract. But that is not the sense in which the term is used in this connection. Upon no such theory are we authorized to review the judgment of the court of a sister state. Whether or not the contract was that of a married woman, and whether such a contract is void seem, at the most, to be questions of fact and of Virginia law, which, according to the law of that state, the courts of that state had jurisdiction to decide. The witness, at the conclusion of his examination says, "the Circuit Court of Nottaway county, as I have already said, has general jurisdiction over such contracts as are referred to in third interrogatory." (The note in question and the coverture of the defendant are set out and averred in the interrogatory.) "That is to say, a judgment could be obtained against a married woman and enforced by an execution levied on her personal effects, but while this is so, I think it very clear, that if such judgment was by default she would have her remedy in a court of equity, to the extent of showing that the judgment was a nullity because rendered on a contract executed by a married woman." Whatever the inference which might be drawn from his previous testimony, it seems to us certain from his final explanatory remarks, which we have quoted above, that a judgment by default against a married woman, after personal service of process, is not void. In other words, being the judgment of a court of competent jurisdiction, it is valid until set aside, reversed or annulled. It follows that we must give it the same effect in this state.

The exceptions are overruled and judgment is entered in accordance with our decision, filed June 23, 1884.

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No. 8

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Court of Common Pleas of Luzerne County.

HART *et al.* v. SECOND SCHOOL DISTRICT OF WILKES-BARRE.

Supersedeas.

1. Where an appeal to the Supreme Court is taken from a decree authorizing the issue of bonds by school directors, the latter should not proceed to issue such bonds until the final decision under the revisory writ.
2. Ewing v. Thompson, 7 Wr. 375, discussed.

Motion for injunction.

The opinion of the court was delivered May 26, 1884, by

WOODWARD, J.—The second paragraph of section 13 of the bill asserts "that on April 29, 1884, they (the plaintiffs) appealed to the Supreme Court from the decree of your honors of April 26, 1884, authorizing the defendants to issue bonds for the sum of ten thousand dollars for the purpose of erecting the said building, and duly entered bail therein, and yet, notwithstanding said appeal, and that it is a *supersedeas* to the said decree, we are informed, and believe, that the defendants are resolved and are about to enter into a contract for the erection of the said building and to issue the said bonds." If the *certiorari* from the Supreme Court does suspend and supersede the execution of the order made by us on April 26, then, of course, the injunction should be continued until the final determination of the case by the Supreme Court. A writ of *certiorari* is not a writ of *supersedeas*, but is a writ commanding an inferior tribunal to certify its record into the appellate tribunal, that the latter court may be sure that no errors in law appear on the record. But if the judgment or

decree of the inferior court is to be followed by no execution issued out of that court, no *supersedeas* is necessary. So far as the inferior court is concerned, their duty was done when the decree was entered. The executive officers whose right it is to carry out the decree, are not officers of the court. And, therefore, the precise question is not, whether the further process of the court is superseded and suspended by the *certiorari*, but rather whether the removal of the record does not compel the school directors to await the action of the Supreme Court before proceeding to act upon the decree of the Common Pleas. And this question seems to us to be answered in the affirmative in the case of *Ewing v. Thompson*, 7 Wr. 375. In that case the court say "there are many cases under our poor laws and school laws where the court does not execute its own decrees, but has it ever been contended that after the record has been removed to be reviewed in an appellate court, the executive officer may go on and execute it as if no review had been instituted? I am not aware of any decisions of this court, or of any other, that would justify an affirmative answer of these questions. Not that the writ is addressed to the executive officer so as to put him in contempt for disobeying it, nor that it is in form a *supersedeas*, but the ground on which it exacts suspension of all official execution is that respect and obedience which the law demands of all law officers for all legal process. No officer is higher than the law, and when the law has instituted a review of a judicial record, all parties claiming rights under it must wait the course of the law." In the same case Judge Strong says, "but, while we do not hold that the *certiorari* served on the court took away from the executive the power to issue the commission to the defendant * * * we do hold that the service of the writ affects the defendant. He was a party to the contest in the Quarter Sessions, not in name, but in substantial truth. It was his right which was in controversy, and his were the fruits of the decree. Upon him, therefore, the *certiorari* may operate. * * * His title to his commission is not taken away, but his right to proceed under it is suspended until the final decision under the revisory writ." Under the authority of *Ewing v. Thompson* we feel bound to hold that the school directors of the Second district should be

restrained from proceeding to act under the decree made by us on April 26, 1884, until the writ of *certiorari* is quashed, or until that decree shall be affirmed and approved by the Supreme Court.

It is now ordered that the motion to continue the injunction granted on May 14, 1884, be allowed, and that the injunction then granted be continued until further order.

E. G. Butler, for plaintiffs.

G. M. Harding and John McGahren, for defendants.

William Henry McCartney was born in Boston, Mass., July 11, 1834. His father, John McCartney, came from Dublin, Ireland, and for many years successfully carried on the manufacture of carriages and fire engines in Brattle Square, Boston. W. H. McCartney was an invalid in his youth, and at the age of twelve went with his mother to Gilmanton, N. H., where he lived on a farm engaged entirely in out-door sports and pursuits until he was eighteen years of age. At that age he had outgrown his physical troubles and he then commenced to acquire an education. He attended preparatory schools at Laconia and at Meriden, N. H., but his education was principally directed by a tutor, John G. Jewett, now one of the judges of the court of Common Pleas of New Hampshire. He studied law with Hon. Asa Fowler and Hon. H. A. Bellows, at Concord, N. H., and subsequently with F. W. Sawyer, at Boston, and was admitted to the bar of Massachusetts in March, 1856. He at once entered into a large and lucrative practice in Boston, and continued therein up to the beginning of the late civil war. Prior to that event he had been connected with the Boston militia; first, in the Light Infantry, an organization then known in Boston as the "*Tigers*," and at the breaking out of hostilities held a commission as first lieutenant in a battery known as the Boston Light Artillery. That organization formed a portion of the three months troops that Massachusetts sent into the field, and Lieutenant McCartney left Boston with his command on April 19, 1861, at half an hour's notice. His command went with General Butler's expedition

from New York to Annapolis and served at the Relay House on the Baltimore & Ohio Railroad, and at Baltimore through the three months' campaign. At the expiration of this service Lieutenant McCartney returned to Boston and raised the First Massachusetts Battery for three years' service, of which he was made captain. During the three years' service he participated in the following engagements: West Point, Mechanicsville, Gaines Mills, Charles City Cross Roads, Malvern Hill, Second Bull Run, South Mountain, Antietam, Fredericksburg, December 14, 1862; Fredericksburg, May 4, 1863; Marye's Heights, Salem Heights, Gettysburg, Rappahannock Station, Mine Run, Saunderson's House, The Wilderness, Spottsylvania, South Anne River, Cool Arbor, Petersburg, Weldon Railroad, Winchester, and Fisher's Hill. He was commended in general orders by General Franklin for "gallantry and conspicuous bravery" at Fredericksburg (December 14, 1862), and at Antietam. He was also commended by General Sedgwick for "gallantry and exceptionally brilliant services" at Salem Heights, Gettysburg, and Mine Run; and by General Brooks for "repulsing most gallantly, without assistance, a brigade of infantry which saved our line from being broken, when to break any portion of it was sure defeat to the whole corps." He was also mentioned by General Lee for "great gallantry and marked efficiency in battery service" at Fredericksburg, December 14, 1862; and by General Barksdale for gallantry in repulsing an assault of Barksdale's brigade at Salem Heights, and for kindness and attention to Confederate wounded at Antietam. For the above named commendations he was brevetted to the rank of brigadier general. In February, 1865, he was made provost marshal and ordered to Massachusetts, and had charge of that department until December 31, when he was mustered out of the service. In January, 1866, he was appointed clerk of the naval committee of the house of representatives at Washington, and was made special counsel by the navy department to collect and codify the testimony taken before the naval committee of the house on the subject of naval steam engineering. In June, 1866, he was appointed collector of internal revenue of the Third Massachusetts district, then comprising most of Boston, and, in point of receipts, the largest revenue district in the country, excepting the

Thirty-First New York district. He was endorsed for this position by the governor and lieutenant-governor of Massachusetts; by the speaker of the Massachusetts house of representatives; by all of the senators and representatives of Massachusetts; by many of the bankers, merchants, and leading business men of the district; by the entire delegation from Massachusetts in the house of representatives; by the Hon. Henry Wilson, of the senate; and by the Hon. John A. Andrew, ex-governor of Massachusetts, as well as by several of the principal living generals under whom he served. He held the position until April 1, 1869, having tendered his resignation in October preceding, to be able to devote more of his time to a contract granted to him by the government of Costa Rica for the construction of a railroad across Costa Rica. He was engaged in his railroad scheme until the spring of 1870, when he resumed the practice of his profession at Boston. He was shortly compelled, through failing health, to give up his practice, and in the beginning of the summer of 1870 he shipped as a sailor on a vessel engaged in traffic with Labrador. On his return from Labrador he went South, where he recovered his health, and on his way back to Boston was persuaded by Manton Marble, then proprietor of the *New York World*, to go into journalism. From January, 1871, to July, 1873, he was connected with the *World* in New York, doing most of his work under the *nom de plume* of "Muldoon, Major of Heavy Artillery." He also edited Fank Leslie's illustrated paper during a portion of that period, wrote magazine articles, and, in connection with the late John H. Selwyn, wrote two plays entitled "The Bayonet," and "Constance." In 1858 he married Anna M. Leach, a daughter of Harry Leach, then of Boston, but formerly of New Milford, Susquehanna county, Pa., by whom he had three children, two of whom, Jessie and Anne McCartney, are still living. His son, Frederick McCartney, died in the spring of 1879, in the twentieth year of his age. His first wife died in August, 1869, and he was married to his present wife, who was Katharine E. Searle, daughter of the late Leonard Searle, of Montrose, Pa., in September, 1872. Shortly after his second marriage he went with his wife to Europe, where they passed a winter, returning in June, 1873, to spend the summer at

Montrose. While there he was induced to give up his literary pursuits and go back to his profession. General McCartney was admitted to the bar of this county September 12, 1873, and has been in continuous practice since. He has by his present wife two children, Ella McCartney and W. H. McCartney. General McCartney has quite a reputation as a political speaker, and since his early manhood has done effective service in that direction. In 1860 he stumped Massachusetts for Stephen A. Douglass. In 1863 he stumped the Third and Fourth congressional districts of the same state, having been granted a leave of absence for that purpose, and making twenty-two speeches in twelve days. It was his services on the stump in that campaign that made him collector of internal revenue. In 1866, he stumped Connecticut with the late Lot M. Morrill. In 1867 he stumped New York for John A. Griswold for governor, and in 1868 he stumped the same state for General Grant for president. In 1872 he again stumped the state of New York for Horace Greeley, the candidate of the liberal republicans for president. Since his residence in this state he has stumped Pennsylvania in 1876 for Rutherford B. Hayes for president, in 1878 for Henry M. Hoyt for governor, in 1880 for James A. Garfield for president, in 1882 for John Stewart for governor, and in 1884 for James G. Blaine for president. General McCartney is a member of the Grand Army of the Republic, of the Loyal Legion (which is composed of officers of the late war and their oldest sons), of the Loyal League, of the United Service Club, of the New England Society of Philadelphia, and many other clubs and societies.

General McCartney is an unusually aggressive man, in and out of his profession; a man of very positive and pronounced views. He may be said to carry many of the attributes that secured him such frequent and flattering commendation as a soldier and commander into both his practice of the law and his political labors. His stump speeches are distinguished by vigorous English and a wealth of appropriate and funny anecdotes, both of which appear to please his audiences in about equal degree. Even those of opposite political faith, however much they may be at variance with his arguments, find pleasure in his oratory—if the word can be applied to anything so thoroughly unpretentious, off-hand,

nected with the Methodist Episcopal church, and held various positions in the church of his choice. He was able, active, intelligent, charitable, and devoted to the interests of his native township. The mother of W. P. Ryman was Jemima Kunkle, a daughter of the late Philip Kunkle, also a native of New Jersey. The late Wesley Kunkle, who was recorder of deeds for Luzerne county from 1860 to 1863, was her brother. Mr. Ryman was prepared for college at Wyoming Seminary, and then entered Cornell University, Ithica, N. Y., in which he graduated in 1871. He then entered Harvard Law school from which he graduated in 1873. He read law with E. P. Darling, of this city, and was admitted to the Luzerne county bar September 20, 1873. He is the senior member of the firm of Ryman & Lewis. Mr. Ryman organized the first telephone and electric light company in this city, and is at present secretary and treasurer of the Wilkes-Barre Electric Light Company. Rev. Charles Ryman, presiding elder in the North Philadelphia Conference of the Methodist Episcopal Church, is a cousin of W. P. Ryman. Mr. Ryman married, December 18, 1879, Charlotte M. Rose, a daughter of George P. Rose, of Fenton, Mich. They have two children, Roselys F. Ryman and Emily M. Ryman. Mr. Ryman is a Republican in politics, but has never held an office. There is both solidity and consistency in the methods which William Penn Ryman brings to the practice of his profession, and to the several other business enterprises with which he has concerned himself. He is fortunate in the fact that his personal appearance gives, even to the indifferent observer, conspicuous evidence of his possessing a fine mental organization, and being ready of speech and animated in manner, he easily prepossesses himself in a client's favor, and when we add that he is both industrious and sincerely heedful to keep his compacts to the letter, we have fully accounted for his already large and growing practice. He is well read in general literature, a good conversationalist, and possessed of other attractive social capacities and qualities. As a man of business outside his profession he is keen-witted and enterprising, and as a consequence already finds himself in easy circumstances. It is in Mr. Ryman, as the years roll on, to become a leading member of the bar, as he is already a good lawyer and a generally useful and prominent citizen.

John Joseph Scanlan was born October 24, 1845, at Inver, in the county of Donegal, Ireland. When but two years of age he emigrated with his father, Peter Scanlan, to this country, settling in Wilkes-Barre, where he has resided the greater part of his life. Mr. Scanlan was educated in the public schools and at St. Mary's College, Wilmington, Del., graduating in the class of 1865. He studied law with D. L. O'Neill, and was admitted to the bar of Luzerne county September 20, 1873. In 1868 and 1869 he was treasurer's clerk of Luzerne county, serving under his uncle, Neal McGroarty, the treasurer. In 1867, 1868, 1869, and 1870 he was one of the auditors of Wilkes-Barre township. He is at present the manager of the Spirit Publishing Company. He married, August 4, 1874, Jessie Annine Leighton, a daughter of David C. Leighton, of Scranton. Mr. Leighton is a native of the county of Kerry, Ireland. Mr. and Mrs. Scanlan have four children living, Mary Scanlan, Jessie Magdellan Scanlan, John Joseph Scanlan, and Peter Leo Scanlan.

John Thomas Lenahan was born at Port Griffith, Luzerne county, Pa., November 15, 1852. His father, Patrick Lenahan, a resident of this city, was born at Newport, in the county of Mayo, Ireland, May 17, 1825. He emigrated to this country in 1846, first settling in Apalachicola, Fla. He resided there for three years, and from there he removed to New York. He then removed to Buttermilk Falls, Wyoming county, Pa., and engaged in the mercantile business. He remained there but one year, and removed to Port Griffith, where he was engaged in business for nine years as a merchant. In 1860 he removed to this city and carried on a mercantile business until 1879, when he retired from business. While residing at Port Griffith he served as a school director and filled other township offices. During the late civil war he served as second lieutenant of company D, Eighth regiment Pennsylvania Volunteers in the three months' service, his regiment being mustered out July 29, 1861. The mother of John T. Lenahan was Margaret Durkin, daughter of the late Hugh

Durkin, a native of Tyrawley, county of Mayo, Ireland. John T. Lenahan was educated under the care of the Fathers of St. Augustine, at Villa Nova College, Delaware county, Pa., and graduated in 1870. He read law with Wright & Harrington, and subsequently* with Rhone & Lynch, spending a portion of the time in the interim in the law department of the University of Pennsylvania, and was admitted to the bar of Luzerne county October 27, 1873. In 1879 he was the democratic candidate for district attorney of Luzerne county, but was defeated by Alfred Dart, the republican candidate; the vote standing Dart 7,292, Lenahan 5,235, and Bryson, labor reformer, 3,814. Mr. Lenahan married, April 26, 1880, Mary Donovan, a native of Philadelphia and the daughter of William Donovan of that city. Mr. Donovan was born near Belfast, Ireland. Mr. and Mrs. Lenahan have two children, William Donovan Lenahan and Gertrude Eleanor Lenahan. Mr. Lenahan is a young man of much force and energy of character, traits which, added to a taste and exceptionally superior capacity for jury pleading have given him an extensive practice, especially in the Quarter Sessions Court. At every successive convening of that tribunal in this county the list shows him to have been retained in a large percentage of the cases. He is a severe cross-examiner, as witnesses opposed to the side on which he pleads are ever willing to admit. He has had fees in a considerable number of the more important criminal cases that have been tried in Luzerne since his admission, and in that connection has made several notable pleas. He is clear in analyzing the circumstances of a crime, separating the material from the immaterial, and constructing from either a highly plausible case, and is especially strong in exposing to the jury discrepancies in the stories of witnesses whose testimony it is his client's interest to invalidate. Following this up with a scathing and vehement arraignment of an opponent, he seldom fails in serving a cause in which he has been engaged to the utmost extent possible from the facts. It has been stated that he was, in 1879, the nominee of the democratic party for the responsible office of district attorney. The party had not yet recovered from a split occasioned by the revolt of the labor element two years before. The bulk of the vote cast for Bryson was

democratic, and, as a consequence, Mr. Darte, the republican candidate, was successful, though, as the figures above given show, it was by a minority of the total poll. Mr. Lenahan has always been, and still is, an active democratic politician. He has served his party frequently as delegate to county and state conventions, and was one year chairman of the county convention. He has also served upon committees, and been frequently upon the stump, his vigorous oratory making him an especial favorite with that large contingent of voters who esteem any other than the bluntest of English and the strongest of invective wasted in a political campaign. His physical comports with his mental structure, being robust and pronounced. He has evidently made good use of his educational advantages, and, being an attentive and intelligent reader of current political and other literature, and of a genial disposition, numbers his ardent friends among the hundreds.

Francis Marion Nichols was born May 23, 1851, at Smithfield, Bradford county, Pa. His great-grandfather, Stephen Nichols, came from England and settled in Connecticut. His son John removed from that state in 1819, and settled in Albany township, Bradford county. The wife of John Nichols, who was Margaret Potter, was also born in England. Her father, Robert Potter was a soldier in the revolutionary war, and was with General Gates at the surrender of Burgoyne. John Nichols was a basket maker, and he had both reputation and pride in the manufacture of that article. The following anecdote is related of him: At one time he offered to make for a neighbor a basket containing one and a half bushels for as much wheat as the basket would convey water from a spring to the house, a distance of a few rods. The offer was accepted and Mr. Nichols began his work. Selecting and thoroughly seasoning his splints, which were cut very narrow, he wove them as closely as possible, and then soaked the basket in water, which expanded the wood and closed the interstices. He then summoned the neighbor, and going to the spring filled the basket with water and carried it to the house, the fluid standing an inch only from the rim. The price was paid.

His son, George W. Nichols, and the father of F. M. Nichols, is a native of Albany. He lives at New Albany, in the same township, and is a millright and carpenter by trade. He has been a justice of the peace for fifteen or twenty years. The mother of F. M. Nichols, and the wife of George W. Nichols, was Elizabeth B. Hemingway, of Rome, Pa. She died May 3, 1872. In a work which Mr. Nichols has in preparation, and which is entitled "An Argument in Favor of the Bible Narration of Man's Creation and Dreams in which Humanity's Future is Revealed and its Shadows Depicted," he pays the following tribute to her memory :

"Many years have elapsed since I received the farewell kiss, and heard the dying prayer of my dear christian mother,—the house in which she endeavored, by her love and tenderness, to guard the susceptibilities of my youth against evil temptations, and with an anxious heart saw me cross the threshold of manhood. All the associations in the midst of which she faithfully did her life's work, the grave within whose solemn walls her physical presence was hidden forever from my sight, are many miles away; but unconnected with all tangible objects, I can sit here in the silence of the midnight hour, and recall before my mind's eyes her cheering countenance and hear again the kind and loving words with which she sought to comfort me in sadness or make more gratifying the fruits of success. I can see her weeping over the missteps of my boyhood, and smiling her heart's joy when she saw the seeds of truth and virtue, which she had sown in my moral nature, beginning to sprout. I can see her, oh, how distinctly, slowly and without a murmur, fading away under the ravages of disease, and when the grim presence of death became visible to her consciousness, in the midst of the tears and sobs of children, friends and neighbors, with a calmness that the terrors of her approaching dissolution could not disturb, and a reliance upon the promises of her Master, that was absolutely free from the weakness of doubt or uncertainty, beseeching God to pour into the broken hearts at her bedside the consolations of a christian's hopes.

But equally as distinct I remember the *influence* of my mother's physical presence. I can re-experience the soothing sensations that came to me from the gentle stroke of her hand upon my forehead, when sickness, anger or disappointments beclouded the pleasures and ambitions of my childhood. When the turmoil and greed of the business contentions of the world are hidden from my sight, and I am permitted to meditate in the quiet and inspiration

of solitude, I can feel in the sensibilities of my soul the touch of her christian and moral instructions, and in the purest recesses of my heart the sacred influences of her last prayer."

Mr. Nichols remained at home until he was sixteen years of age, and has depended upon his own resources since. In his early youth he was a teacher in the schools of Athens and Ulster townships in his native county, and also for a while he taught mathematics in Macaulay's Business College at Lawrence, Kansas. He finished his education at the State University of Kansas at Lawrence. He entered as a Sophomore, and remained in the institution for three years. While at Lawrence he commenced to read law with Barker & Summerfield, and finished his reading with W. A. & B. M. Peck, at Towanda, Pa., and was admitted to the Bradford county bar in the spring of 1873, and admitted to the Luzerne county bar October 28, 1873. In 1879 Mr. Nichols was appointed by the court district attorney of Luzerne county to fill the vacancy caused by the election of Charles E. Rice, then district attorney, to the bench. In the same year he was a candidate for nomination in the republican county convention for the same office, but was defeated by a few votes only. In 1880 he was appointed by Attorney General Palmer a special assistant for Luzerne county. In 1881 he was chairman of the Luzerne county Independents, who refused to support the nominee of the Republican state convention for state treasurer. In 1882 he was the Republican candidate for district attorney, but was defeated at the polls by John McGahren, democrat, the vote standing: Nichols 9,394, McGahren 10,358. Mr. Nichols married February 1, 1874, Mary Corker of Norwich, N. Y. She died February 2, 1883. They had the following named children: Florence Edmonda Nichols, Lyman Bennett Nichols, Lester Wilson Nichols and Leona M. Nichols. Mr. Nichols married a second time, July 3, 1883, Almina Wilson of Clifford, Susquehanna county, Pa. They have one child, Francis Marian Nichols.

Mr. Nichols has been a republican ever since he arrived at voting age, but not of the sort who blindly accept whatever is done in the party name as constituting a gospel from which there is no right of appeal. As a consequence he has been in antagonism with the party management, and not in sentiment only, but in

action. He led the revolt against Cameronism in the beginning of the opposition in the party to the continued domination of the faction whose doctrine or method was expressed in that word. His activity at the time was characterized by all the ardor of youth and firm conviction. He acted as chairman of the Independents, as they were called, for Luzerne county, wrote letters, made speeches and devoted much time and care to the details of organization. A year later, however, he returned to his old allegiance, was nominated for district attorney, and since has been equally active and earnest for the regular organization and ticket. He has done much duty upon the stump, being a ready talker and always read up in current politics. During the campaign of 1884, he prepared a lengthy essay upon the tariff and delivered it to a large audience in the court house. It was an able and exhaustive presentation of the subject from his standpoint, which was the essentiality of the protective system as distinguished from the doctrine of incidental protection. As an attorney Mr. Nichols is well-booked, painstaking and possessed of a happy capacity in pleading to a jury. Though he combines other business with his practice he has a considerable clientage and is rated among the most successful of the younger members of the bar.

Emory Robinson was born in the village of Lenoxville, Susquehanna county, Pa., July 6, 1849. He is the youngest son of Daniel Robinson, a native of the same place. His great-grandfather, Robert Robinson, left the State of New Jersey in company with eleven other persons and settled at Natchez, on the Mississippi river. He was killed while working in the field, by Indians. This settlement was commenced before the revolutionary war. Mr. Robinson left his family in New Jersey, and they knew nothing of his fate until after the close of the war. His grandfather, Bryant Robinson, served in the war of the revolution, enlisting at the age of fifteen years. He was a native of Morris township, Morris county, N. J. The wife of Bryant Robinson was Elizabeth Scott, a daughter of James Scott, of Sussex county, N. J. They removed from New Jersey to Pittston, Pa.,

in 1788, where their two eldest children were born. From there they moved to Nicholson, Luzerne (now Wyoming) county, Pa., in 1795, and from there to Lenox, Luzerne (now Susquehanna) county, where, as we have already stated, the father of the subject of our sketch was born. The mother of Mr. Robinson was Clarissa Sweet, a daughter of Jacob Sweet, of Susquehanna county. Mr. Sweet was the son of Captain Jacob Sweet, of the State of New York. He resided near the head waters of the Susquehanna river. He was a lumberman, and while taking a raft down the Susquehanna river, in running through a chute the raft was wrecked and he was drowned. Mr. Robinson's early life was spent in the usual labors of a farmer's son, with the exception that his parents were liberal in allowing him any opportunity he desired for mental culture which could be secured in the neighborhood. At the age of sixteen years he had passed all the studies taught in the schools of the village, somewhat noted for their advancement, and with the aid of an accidental teacher of more than ordinary culture, had advanced far in the higher mathematics. By the aid and encouragement of a Rev. Mr. Parsons he carried on his studies as best he could, and in 1868 entered as freshman the class of '72, in the Lewisburg University, in the full classical course. He left the University during the Sophomore year, and during the next two years and a half pursued his classical studies in Philadelphia, under most competent instructors. During a year of this time he also had the benefit of lectures in the law department of the University of Pennsylvania. He then went to Smethport, McKean county, Pa., where he registered as a student with the Hon. Warren Coles. Mr. Coles removed to the West, but on certificate of study and on examination he was admitted to the bar of his native county, in November, 1872. He commenced the practice of law at Carbondale, Luzerne (now Lackawanna) county, and was admitted to the Luzerne county bar, January 5, 1874. In 1875 he was a candidate for the legislature in the Eighth legislative district, but was defeated by Thomas W. Loftus. In 1877 he removed to this city and has been in continuous practice since. Mr. Robinson is a man of rare natural ability, which he has supplemented by much reading. He is a clear and logical thinker and deliv-

ers an excellent address, either professionally to the court or before a jury, or from the platform in a political campaign. It is not too much to say that some of his pleas have evinced an understanding of the law, an insight of the real merits of a cause and a fervor of eloquence that few, even of the older members of the bar, might not envy. He enjoys a fair practice, which might be much larger if he would manifest a greater hunger for the plaudits of the people and for the creature comforts it would bring. By this we mean that if his ability were equalled by his push, there are some other young attorneys at the bar who would quickly be called upon to sacrifice a portion of their clientage. Mr. Robinson has been from early manhood a democrat of pronounced convictions, and seldom allows himself to be worsted in an argument as to the righteousness and wisdom of the principles of that party. He has been frequently upon the stump, and while manifestly not aspiring to eloquence for the sake of eloquence, attains to it by the very keenness of his reasoning and quiet force of his logic and metaphor. He is one of the bachelors of the fraternity, is easy-going and affable in demeanor, and has many friends.

Quincy Adams Gates was born December 19, 1847, in Scott township, Wayne county, Pa. Scott is on the Delaware river and is the northeastern township of Pennsylvania. Mr. Gates was educated at Deposit (N. Y.) Academy, and studied law with C. P. & G. G. Waller, at Honesdale, Pa., and was admitted to the Wayne county bar December 2, 1873. He then removed to Carbondale, Pa., and practiced in that city for sixteen months. Desiring a wider field he removed to this city and was admitted to the Luzerne county bar January 22, 1874, and has been in continuous practice since. Mr. Gates' great-grandfather, Sylvanus Gates, and his grandfather, A. W. Gates, removed to Wayne county in 1818 from Worcester, Mass. His father, Alpheus W. Gates, is a native of Mount Pleasant, Wayne county. His mother is Semantha L., daughter of Major Martin Hall, of Jackson township, Susquehanna county, Pa. Major Hall is a native of Halifax, Vt., where he was born in 1792. He removed to

Susquehanna county in 1815, and is still living. The wife of Major Hall was Emily Lamb, a daughter of David Lamb, of Jackson. She was also from Vermont. L. M. Gates, M. D., of Scranton, is the only brother of the subject of our sketch. Quincy A. Gates is a republican in politics, but not a politician in the ordinary sense of that term. He has never held an office nor desired one. He is also an unmarried man. Few men in the acquaintance of the writer are more devoted to their profession, or more willing to work to succeed in it. The industry of Mr. Gates has passed into a proverb among his brother professionals, and is deserved too. No legal problem is sufficiently knotty to affright him, and no necessary search, either of records or opinions, can be such a consumer of time or provoker of toil as to discourage, or even tire him. This seems like strong language, but the devoted application and energy which Mr. Gates has brought to the overcoming of the difficulties that attend every young lawyer who attempts to build up a practice in a community in which he begins a comparative stranger, deserves it. With even more meagre opportunities to begin upon, such persistent study and zeal must needs have resulted in the in-bringing of a large and profitable clientage. Many young men otherwise in every respect fitted to win a foremost place in the profession, enter it with the suicidally-erroneous idea that the necessity for study has ceased with their admission, and that the chief duty of a lawyer is to sit in his office and extend his open palm for the rich fees that clients will crowd each other to drop into it. There are so many such, in fact, that no one of the professions record as frequent failures of those who, as students, gave their relatives and friends apparently the best reasons for the rosiest hopes of their success. It is a genuine pleasure, therefore, for one whose position is such that he cannot help but note such things, to have occasion to mention so striking an instance of that push and determination which is the price of victory, whether for clients or for self, in the practice of the law. Mr. Gates is an estimable citizen as well as a good and rising lawyer. Mr. Gates, prior to his commencement of the study of the law was a civil engineer, and as such did work for the central branch of the Union Pacific Railroad, and also as a surveyor of the public lands in western Kansas.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, FEBRUARY 27, 1885.

No. 9

Orphans' Court of Schuylkill County.

BARLET'S ESTATE.

The refunding bond which an executor is entitled to demand from the heirs, can be demanded where the executor makes distribution, but not where the distribution is made by an auditor and confirmed by the court.

Rule upon executor to pay over distributive share.

The opinion of the court was delivered January 22, 1883, by

GREEN, J.—By the report of the auditor making final distribution of the estate of Charles Barlet, deceased, it appears that Orleana Hay, one of the children and heirs of decedent, is entitled to the sum of \$1,182.49 as her distributive share. This report was confirmed absolutely. Upon a rule taken upon the executor, D. L. Esterly, to pay this amount, he makes answer that he is anxious and ready to pay, but that he is entitled to and demands a refunding bond before making payment. This demand of the executor seems to be entirely arbitrary and exceptional in its character, for it is admitted that he has made settlement with all the other heirs without requiring such a bond. Nor does he urge any special reason why it should be given by the petitioner. The distributee having refused to give a refunding bond, the question before the court for decision is, has the executor a right to insist upon having such a bond before payment? He claims this right under the 39th, 40th, 41st, and 45th sections of the act of February 24, 1834, P. D. 443, 447, 448. The 39th and 40th sections provide for a distribution by the administrator under the

direction of the Orphans' Court. It provides that "the administrator shall make a statement of all demands against the estate which have been made known to him, and, after deducting the amount thereof from the assets in his hands, together with such further sum as may be necessary to pay the interest and costs of suit of such as may be in dispute, and of such as he may deem it his duty to dispute, make distribution of the residue under the direction of the Orphans' Court aforesaid." The 40th section provides for subsequent distributions of a like character. The 41st section provides that before any person shall receive any share in such distributions he shall give sufficient real or personal security, to be approved of by the court, "with condition that if any debt or demand shall afterwards be recovered against the estate of the decedent, or otherwise be duly made to appear, he will refund the ratable part of such debt or demand, etc.;" and if he is unable to give this security, then the money is to be placed at interest on security approved by the court, and the interest to be paid annually to him, and the money is then to remain at interest until the security is given, or the court shall, on application, order it to be paid to the person entitled to it. The 45th section applies the same condition to distributions in proceedings in partition. I think it must be evident from the reading of these sections that they only concern such distributions as are made without calling in all the parties in interest and without judicial hearing and determination. Such distributions are not conclusive upon any one; certainly not upon parties who have not been summoned to appear and have not been heard. Therefore the law wisely provides that when such a distribution is made, refunding bonds shall be given, so as to protect the administrator, and those also who have not been heard. But a distribution made by the court through the agency of an auditor stands upon an entirely different footing. Here, after due notice to all parties interested, the rights and claims of all are heard, passed upon, and adjudicated. Each creditor or claimant has a right to appear and to be heard so far as may be necessary for the protection of his own interest, and of this proceeding the administrator has not the control, nor is he responsible for errors in the distribution so decreed." *Kittera's Estate*, 5 Harris, 423. The distribution of the auditor, when

confirmed by the court, becomes as conclusive as a judgment at law, and nothing can shake it except a reversal by the Supreme Court. It is not even subject to a bill of review under the act of October 13, 1840. (See *Cunningham's Appeal*, 2 Pitts. Rep. 177, decided by the Supreme Court.) A distribution thus made, being so conclusive and binding upon all parties, how can a distributee be made to refund any portion of what has been judicially decreed to him? If he must not refund, why compel him to give a refunding bond? It would be but waste paper. *Lex neminem cogit ad vana seu inutilia peragenda*. If he was not able to give the required security must he, on that account, be satisfied with the interest alone, and never be allowed to touch the principal? And that, too, even when all parties have been finally concluded by the decree of the court. The law was not intended to be thus construed. The case of *McCarthy's Estate*, 2 W. N. C. 128, is cited as an authority to sustain the position of the executor as to his right to demand a refunding bond, and a casual examination of the order of the court in that case would seem to be in direct opposition to the views I have expressed. It was the case of a distribution made by an auditor; a refusal by the executor to pay without a refunding bond being given, to which a replication was filed asserting that more than five years had elapsed since the death of the decedent, and that, therefore, a refunding bond was not necessary. The court stayed the order to pay. But it is evident that the facts of the case have not been fully reported. The case evidently turned upon a question of distribution upon proceedings in partition to a person who had only a life estate, and where the administrator had himself been required to give a refunding bond for the money in his hands to be distributed. The 46th section of the act of February 24, 1834, P. D. 431, pl. 126, relating to a distribution to a tenant for life upon giving security, and the act of April 13, 1859, P. D. 448, pl. 211, requiring a distributee to give a refunding bond when the administrator has been required to give one, are the only acts of assembly cited in the argument of counsel. The right of the executor to demand a refunding bond turned upon an entirely different question, and the case, therefore, upon careful examination, is not an authority for the position assumed by the executor.

Under the law of the case, I therefore think the executor was bound to pay without a refunding bond; and that the order asked for on him to pay the sum distributed to said Orleana Hay, with interest from the time of demand, should be granted, and that he pay the costs of this proceeding.

BOOK NOTICE.

ANNUAL DIGEST OF THE DECISIONS OF THE COURTS OF THE STATE OF PENNSYLVANIA published during the year, containing all the cases in the regular series of Reports; also those in the legal periodicals, together with a table of cases followed, distinguished and overruled, and Acts of Assembly construed. By Arthur Latham Baker, Esq., of the Lackawanna county Bar. Vol. 1, 1883 and 1884. Rees Welsh & Co., Philadelphia, 1885.

The author of this book certainly gives evidence of a very remarkable talent for analysis and digesting. The heads under which the decisions are arranged, and the system of cross-reference adopted, make us regret that he has not given the broader field of a general digest his attention.

A table of cases discussed and distinguished, another of those discussed and followed, a list of acts of assembly that have been construed, the articles of the constitution that have been considered by the courts during the year, precede the regular body of the work, and in a small compass give a very good view of the scope of litigation in this commonwealth. The work digests fully fifteen volumes, and is the most thorough effort in the line of its usefulness that has lately come to our notice. We hope that it may be so useful to the profession that it will remunerate the projector and author for the extraordinary amount of labor visible in its pages. It should be in the library of every lawyer in active practice.

E. B. Yordy has a few more Court Rules left. They contain the rules of the Common Pleas, Orphans' Court, Quarter Sessions, Supreme Court, and Equity.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, MARCH 6, 1885.

NO. 10

Court of Common Pleas of Luzerne County.

JOHNSON v. THE BOROUGH OF PITTSSTON.

Summary conviction—Arrest upon view for violation of borough ordinance.

1. Essentials which must appear of record in a summary conviction.
2. Where an individual is arrested on view and is brought before a magistrate to be summarily proceeded against, before he is put upon trial the charge against him, if made orally, should distinctly and with certainty describe the particular violation of law or ordinance for which he has been arrested, and this should be made a matter of record as the foundation of the proceedings.
3. The power to arrest on view for the violation of an ordinance not amounting to or tending to a breach of the peace—even if it can be conferred at all by mere ordinance—ought to be exercised with extreme caution and moderation.

Certiorari.

The opinion of the court was delivered December 3, 1883, by

RICE, P. J.—Section 1 of Title XII. of the ordinances of the borough of Pittston is as follows: "It shall not be lawful for any railroad company, coal or mining company, association, individual, or persons in their employment, to leave standing on the street crossing of any public street, lane, or alley any engine, car or cars, truck or trucks; or to blow or sound the whistle of such engine within the limits of said borough; nor to cross any of said streets, lanes, or alleys at speed greater than the ordinary walk of a person; or to run said engines, cars, trucks, or any of them, through or over any street of said borough at a greater rate of speed than four miles per hour, and the person or persons in charge of any such engine shall ring the bell continuously while such engine is running on or across said streets, or approaching a street crossing; and any person or persons violating this ordinance, or any part thereof, shall, on conviction before the burgess, forfeit and pay a fine of not less than twenty-five dollars, nor more than fifty-dollars, for each offense, with costs." By section 2 of the ordinance "the police of the borough are directed and required to arrest, on their own view, any person or persons found violating the above ordinance." The plaintiff in error, being at the time a conductor in charge of a certain train of cars

which ran upon the track of the Lehigh Valley Railroad Company, was arrested by a policeman of the borough without previous information or warrant, and was at once taken before the burgess, where he was charged by the policeman with having, in his view, violated Title XII., sections 1 and 2 of the ordinance of the borough of Pittston entitled "Engines, cars, etc.," (we quote from the record) the said sections of the ordinance being set out at length by the burgess on his record. Upon the hearing, which appears to have been had immediately after the arrest, the evidence was that the plaintiff in error had allowed the engine and train of cars which he had in charge to run at a greater rate of speed than four miles per hour across and through Main street in said borough. Upon this evidence the burgess, in general terms, found that the plaintiff in error was guilty, and convicted him of violating the foregoing sections of the ordinance, and thereupon adjudged that for the said offense he had forfeited to the borough the sum of twenty-five dollars, in the nature of a fine or penalty, for which sum, together with costs, judgment was entered. This *certiorari* issued upon special *allocatur*. While many of the technical formalities of a summary conviction have long since been dispensed with, there are some essentials which still exist and must appear on the record. The first essential is an information or charge describing and defining the offense. *Com. v. Borden*, 11 Sm. 272; *Com. v. Davenger*, 2 Luz. Leg. Reg. 178. One of the purposes of this requirement, where the defendant is arrested by virtue of a warrant or on view, is, to inform him of the nature and cause of the accusation, so that he may meet it intelligently if he has any defense to make. The oral statement of the charge, where a defendant has been arrested upon view without a previous written information describing the offense, is, therefore, to be distinguished from the evidence which is adduced on the hearing in support of the charge, and the substance of which the magistrate is required to set forth on the record. For, although the nature of the offense and the exigencies of the case may be such as to justify an arrest on view without the usual safeguard of a previous information describing the offense with certainty, surely there can be no good reason for holding, that after the defendant has been arrested and there is no longer occasion for unusual haste, he may be compelled to

wait until the testimony is given in order to learn the accusation which he has been called upon to answer. If we are correct in our conclusion that one purpose of the rule is as above stated, it would seem to be clear that where an individual is arrested on view and is brought before a magistrate to be summarily proceeded against, before he is put upon trial the charge against him, if made orally, should distinctly and with certainty describe the particular violation of law or ordinance for which he has been arrested, and this should be made a matter of record as the foundation of the proceedings. Herein we think these proceedings were irregular. The record, it is true, states that the plaintiff in error was charged with having violated certain sections of a certain title of the ordinances, and what these sections contain is set out at length. If they simply prohibited a single act it might possibly be said that the charge as made was sufficiently specific. But it will be observed that the violation of any part of the ordinance subjects the offender to a fine, and, upon analysis, it will be found that five different and distinct acts of omission or commission are prohibited and made punishable, namely: First. Leaving any engine, cars, or trucks standing on a street crossing. Second. Blowing the whistle of an engine within the limits of the borough. Third. Crossing a street at a greater speed than the ordinary walk of a person. Fourth. Running an engine or train through or over any street of the borough at a greater speed than four miles per hour. Fifth. Failing to ring the bell continuously while running on or across any street, or approaching a street crossing. Manifestly, these are not constituent parts of a single prohibited act, nor different degrees or grades of one general offense, but, although the section relates to one general subject, each clause in which these several acts are forbidden is as distinct from the others as though it had been made to constitute a separate and independent section. Now, when it is borne in mind that the plaintiff in error was arrested on view, presumably for some act being then and there committed by him in the officer's presence, and that, from the very nature of the several prohibited acts mentioned in the ordinance, they could not well have been committed by one person at the same point of time, it becomes apparent that it could not have been the real intention to charge him with having violated the ordi-

nance in all of its provisions. Hence the record cannot be sustained upon the theory that there was merely a failure to establish all of the charges in the proof, but sufficient evidence to warrant a conviction of part of the charge. The defect is not in the proof of the specific act to which it relates, but in stating the charge in such general terms as to furnish no definite information of the special act for which the plaintiff in error had been arrested and was put on trial. (See *City v. Kosek*, 1 Kulp, 454.) For this reason the judgment must be reversed. It will be seen upon examination of the record that the judgment entered by the burgess is quite as general as the statement of the charge, but as this has not been made the subject of exception we need not inquire whether the statement of the evidence has the effect of rendering it certain what special act the plaintiff in error was found to have performed in violation of the ordinance. (See *Reid v. Wood*, 13 W. N. C. 512.) We have been asked by the plaintiff in error to decide that the 2d section of the ordinance authorizing the police of the borough to arrest on view any person violating the provisions of the 1st section is void; that the burgess, under the general borough laws, had not jurisdiction, and that the 1st section of the ordinance is unreasonable and oppressive. It will be seen that these are questions of very great and general importance. We have given to them much thought and examination of authorities, but upon reflection have concluded that, as the case does not positively require their decision, to leave them for future consideration. It may not be amiss to say, however, that the power to arrest on view for a violation of an ordinance not amounting to or tending to a breach of the peace, even if it can be conferred at all by a mere ordinance, ought to be exercised with extreme caution and moderation. As has been said with regard to proceeding by warrant of arrest, so it may be said here with much greater force: "Where the person is a householder or well-known inhabitant not likely to flee, the better course is to proceed by summons, unless it is otherwise directed by the statute." *Com. v. Borden*, 11 Sm. 276. See, also, *Sharp v. City of Wilkes-Barre*, 1 Kulp, 73, where it was held that an arrest on view for violation of an ordinance against the erection of frame buildings was unjustifiable.

The judgment is reversed.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, MARCH 13, 1885.

NO. 11

Court of Common Pleas of Luzerne County.

GLENNON v. THE COUNTY OF LUZERNE.

1. The census of 1880 showing that the county of Luzerne contained less than one hundred and fifty thousand inhabitants (sec. 2 of the act of May 11, 1881, P. L. 22), did not prevent the act of June 22, 1883, P. L. 139, from going into effect as to said county.
2. Whenever an effort is made to apply the act of March 31, 1876 (salaries), to an officer of any particular county, the fact to be ascertained is, whether the county contained sufficient population at the time the officer entered on the duties of his office.
3. Whatever the population may previously have been, or what it may hereafter become, does not control the case.
4. The population of a county in any particular year is a matter susceptible of proof like any other fact, and is also a proper subject of agreement by the parties, if they see fit to dispense with proof.
5. In a case stated the court cannot be called upon to find the facts from the evidence, nor to pass upon the sufficiency of the reasons upon which the parties may base their admissions, whether such reasons are stated or not.
6. The case stated admitted that when the plaintiff entered on his official duties as recorder (1884) the population of the county was over one hundred and fifty thousand, notwithstanding the census of 1880 showed a less population. *Held*, that, on the admitted facts, the plaintiff is to be compensated according to the act of 1876; also, that the effect of the admission was not destroyed by the subsequent statement of the reasons upon which it was based.

Case stated.

The opinion of the court was delivered March 9, 1885, by

RICE, P. J.—This is an amicable action and case stated in which the court is asked to decide whether, upon the admitted facts, Joseph H. Glennon, recorder of deeds (elected in November, 1883), is entitled to be paid under the salary act of March 31, 1876, P. L. 13, or the act of June 22, 1883, P. L. 139.

I. In the first place, the plaintiff contends that Luzerne county is still under the act of 1876, by virtue of the provisions of sec. 2 act May 11, 1881, P. L. 22, notwithstanding the decennial census of 1880 showed that the county had, at that time, less than one hundred and fifty thousand inhabitants. We cannot assent to this proposition. Even though it be conceded that the section was intended to have a retroactive effect upon the status of the county, and also that, giving it that effect, the section

would not be in contravention of section 3, article III, of the constitution, still it would not prevent the subsequent act of 1883 going into effect. All that the section undertakes to do, at the very most, is to preserve the schedule of salaries in counties within the purview of the act of 1876, "until altered by act of assembly." There is nothing in this section to prevent the legislature from passing a subsequent general law to regulate salaries in counties which, in fact, contain less than one hundred and fifty thousand inhabitants.

II. In the second place, the plaintiff contends that he is to be compensated according to the act of 1876 because, as matter of fact, on the first Monday of January, 1884, when he assumed the duties of his office, the county contained more than one hundred and fifty thousand inhabitants, notwithstanding the decennial census of 1880 showed that, at that time, it contained less.

In the case of *Luzerne County v. Griffiths*, 1 Kulp, 297, this court said: "In the absence of express legislative declaration of the fact, or of any other method provided by the legislature for ascertaining it, the last preceding decennial census is to be resorted to as the best evidence of the population of a county in case of classification of counties by population." In the subsequent cases of *Harris v. County*, 2 Kulp, 106; and *Monroe v. County*, 7 Out. 278, the rule was stated by us in substantially the same language, except that the words "or other proof" were added. The question finally came before the Supreme Court, and it was there held as follows: "Whenever an effort is made to apply this act (March 31, 1876) to an officer of any particular county, the fact to be ascertained is, whether the county contained sufficient population at the time the officer entered on the duties of his office. Whatever the population may previously have been, or what it may hereafter become, does not control the case." It will be seen from the foregoing that the population of a county, in any particular year, is a matter susceptible of proof, like any other fact in any suit in which the question is involved, and is also a proper subject of agreement by the parties, if they see fit to dispense with proof. As in the case cited (*Monroe v. County*, 7 Out. 278), so here, the question as to the mode of proving the fact does not arise; for the case stated contains the following distinct agreement that "when the said plaintiff entered

on his official duties the population of Luzerne county was over one hundred and fifty thousand and less than two hundred and fifty thousand." The effect of that admission, for the purposes of the present suit, is to dispense with proof, and we cannot see that its effect as an admitted fact is destroyed by the subsequent statement of the reasons upon which it is based. In a case stated the court cannot be called upon to find the facts from evidence, nor to pass upon the sufficiency of the reasons upon which the parties may base their admissions, whether such reasons are stated or not. The duty of the court is to declare the legal conclusions upon the admitted facts. What the parties admit to be a fact is to be taken as proved, whether the court may conceive their reasons for admitting it to be good or bad. Hence we express no opinion as to the conclusiveness, or even reliability, of the ratio between the number of taxables and total population in any one year as a ratio for ascertaining the population in any subsequent year, the number of taxables being known. All that is decided is, that the fact being admitted that when the plaintiff entered upon the duties of his office, the county contained more than one hundred and fifty thousand inhabitants, he is to be compensated according to the act of March 31, 1876, and therefore is entitled to judgment.

In accordance with the stipulations of the case stated, judgment is entered in favor of the plaintiff for the sum of two hundred and ninety-one dollars and sixty-six cents.

Court of Common Pleas of Montgomery County.

RIEFF v. COMMONWEALTH.

Certiorari.

A separate penalty may be imposed upon a merchant violating the Sunday laws for each separate sale made to different persons, although upon the same day.

The opinion of the court was delivered February 23, 1885, by BOYER, P. J.—Frank D. Reiff was convicted before the justice of the peace of three separate offenses on the same day against the act of April 22, 1794, prohibiting "any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday," and providing that "every such person so offending

shall for every such offense forfeit and pay four dollars." The alleged violations of the law consisted of the selling by Reiff, at his store, of three different articles of merchandise, separately, to three different individuals, at different times on the same Sunday. The contention is, that these sales having been made on the same day, constituted but one continuous violation of the law, for which but a single penalty can lawfully be exacted; and that, therefore, the imposition of a fine for each of the three sales was contrary to the true meaning of the act. If this were so, the fine of four dollars might operate simply as a license fee to keep open a store on the Sabbath and take advantage of more law-abiding merchants, who, in obedience to law, abstained from business on that day. This certainly could not have been the intention of the act. But penal laws, it is said, must be strictly construed; and so they must. But they must likewise be reasonably construed according to their letter. The act in question reads that "if any person shall do or perform any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday, works of necessity and charity only excepted, * * * every such person so offending shall *for every such offense* forfeit and pay four dollars." It is surely in accordance with a strict construction of the language of the act, to hold each separate sale of merchandise to different persons such offense; and that for every repetition thereof on the same day the penalty is incurred. If our act of 1794 were worded as was the statute of 29 Charles II., which provided against the exercise by any tradesman, artificer, or laborer of his ordinary "business or calling" upon Sunday, it would justify a construction similar to that applied to that statute in the English cases cited. But the difference is very clearly shown by Judge Pearson in the case of *Duncan v. The Commonwealth* reported in 2 Pearson, 213. There are cases, doubtless, where all the acts of one day might constitute a single punishable offense, as in the examples cited by Judge Pearson, of a wagoner driving on the road all day, or the farmer hauling in his grain, because but one piece of work. But the storekeeper selling one article to one man, and other articles to another man, each time offends the act in a different transaction. For similar constructions in analogous cases see *Com. v. Borden*, 11 P. F. S. 272; *Com. v. Cooke*, 14 Wright, 201.

The judgment of the justice is affirmed.

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VOL. XIV.

FRIDAY, MARCH 20, 1885.

NO. 12

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Court of Common Pleas of Luzerne County.

WINCHESTER *et al.* v. PENNSYLVANIA COAL COMPANY *et al.*

Islands in the Susquehanna river.

1. What is an island in the contemplation of the Pennsylvania statutes, and the method of acquiring title thereto.
2. River warrants laid, by authority of law, upon the *bed* of the river, should stop at low water mark around the shore of an island, instead of running through or over it.
3. The doctrine of accretion does not apply to a case like this. The question here is, what was the condition, location, and size of this island at the time the plaintiffs' title attached? It is that condition, and not the island as affected by accretions since, which fixes the bed of the river for the purposes of this case.

Ejectment for Wintermoot Island.

Hon. Stanley Woodward, A. L. J., charged the the jury in above entitled cause February 18, 1885, as follows:

Gentlemen of the Jury:

This is an action of ejectment, brought by the widow and heirs of S. S. Winchester, deceased, against the Pennsylvania Coal Company and others, to recover certain premises described in the writ as an island, known as Wintermoot Island, lying in the Susquehanna river just below Pittston. To establish their title to this island, the plaintiffs have shown, first, a warrant issued October 4, 1870, authorizing a survey of this island to S. S. Winchester and David Culver, who had applied for it in the usual manner. This survey was returned October 14, 1870, and showed thirty-seven acres of land as a result. Upon this return of sur-

vey is endorsed an assignment by David Culver to S. S. Winchester of all his (Culver's) interest. On October 15, 1870, in pursuance of the warrant, survey, and assignment, the commonwealth of Pennsylvania issued to Stephen S. Winchester her patent for this island, said to contain thirty-seven acres and fifty-eight and nine-tenths perches of land. Previously to the issuing of the warrant, commissioners had been appointed, according to the provisions of our statute, and had reported that there was an island four feet in height at the place named, that it contained at least forty perches susceptible of cultivation, etc., according to the requirements of the statute, to which I will not further call your attention at this time. Next, the plaintiffs call Mr. Sturdevant, a surveyor, who identifies this Wintermoot Island as the same land described in the writ of ejectment in the case before us. Plaintiffs then rested. In the absence of anything else shown in the case, plaintiffs would be entitled under this showing to recover the land claimed by them.

A defense, however, is made against the claim of the plaintiffs by the Pennsylvania Coal Company. We remark at the outset, that the defense applied only to the coal and other minerals lying under the alleged island, and not to the surface of it; in other words, there is no denial that the plaintiffs have shown title to the surface of this island, if, as matter of fact, such an island exists. The defendants, to establish their title to the coal and minerals, show first, under date of April 20, 1848, a warrant issued in favor of one William Sayford, for one hundred acres of the bed of the Susquehanna river, lying between low water marks at a certain part of the river, which would include the land in controversy. On July 3, 1848, this survey was returned by Henry Colt, the county surveyor. On March 21, 1849, Sayford assigns his title and interest to one Thomas J. Rehrer, and on March 24, 1849, in pursuance of the warrant, return of survey, and assignment, to which I have called your attention, the commonwealth of Pennsylvania issued to Thomas J. Rehrer her patent for the coal and minerals described in the warrant and return of survey. Another warrant was granted about the same time to one Asa Dimmick, to which a return of survey was had, and of which, also, an assignment was made to Thomas J. Reh-

rer, as in the former case, and on March 26, 1849, the commonwealth of Pennsylvania issued her patent to Thomas J. Rehrer for that warrant also, thus vesting in Rehrer the title to the coal and minerals underlying the Susquehanna river as described in the two warrants referred to. Without going over in detail subsequent conveyances it will suffice to say, that they result in vesting in the Pennsylvania Coal Company, the present defendants, whatever title Thomas J. Rehrer took by virtue of his patents from the commonwealth, to which I have called your attention.

Now, the question in this case is this: Did the title to the coal and minerals under the premises described in the writ of ejectment pass, by virtue of the patents issued to him by the commonwealth, to Thomas J. Rehrer in 1849? The survey and description include these premises. About that there is no doubt. But did the title pass? To answer this question it becomes necessary, under our view of the case, to ascertain whether Wintermoot Island existed in 1849.

What is an island, in the elementary sense, we have all learned at school; it is not necessary to dwell on that. What is an island, as defined by the Pennsylvania statutes, is also to be considered in the present case. The statutes which provide the method of acquiring islands in the Susquehanna river describe what is contemplated by the use of the word "island" in a legal sense. In this connection it will be proper to call your attention to another point; that, originally, the river Susquehanna belonged to William Penn. It was never granted away by him. The title to it vested in him by a royal charter, or grant, from the king of England, but on May 9, 1771, an act was passed, which was assented to by William Penn, which declared the Susquehanna river a public highway. Thus, and then, this river become the property of the commonwealth. In England, at common law, a river in which the tide does not ebb and flow, and which is not navigable, belongs, not to the government, but to the owners of the land on either side; and, therefore, an island in such a stream would belong to the adjoining shore owner nearest to it. But the Susquehanna river is a public highway, and a navigable river, and therefore belongs, not to the adjoining owners, but to the commonwealth or her grantees.

I will now state to you, as I understand it, the description of an island under our statute—such an island as the commonwealth will grant to her citizens by survey, warrant, and patent. The act of assembly of 1822, following that of 1793, provides that any sand or gravel bar, or accumulations of mud in the river Susquehanna which shall not come under the description of an island as contained in the preceding section, shall be considered as part of the public highway. The preceding section referred to is as follows: "No application shall be received in the Land Office for any island in the river Susquehanna, unless the same be at least four feet high above common low water mark, containing at least forty perches of ground, exclusive of rocks, be susceptible of cultivation in grain or esculent roots in common seasons by their growing and becoming maturely ripe." And under these statutes it has been held in Pennsylvania, in a decided case, that territory, to be liable to grant as an island, must have a soil capable of sustaining vegetation. I refer to the case of *Allegheny City v. Reap*, 24th Penn. State, 39.

This brings us, gentlemen, under our view of the case, to the question of fact involved in this controversy; a question, of course, for the jury to decide from the evidence which they have heard. Was there such an island as the statute contemplates, at the place named, in 1848? If you find in the affirmative, that there was, we say to you that the survey of the river right, or warrant, being confined to the bed of the river would not include land constituting such an island. In other words, a survey of the bed of the river such as defendants claim under, would stop at this island and follow its courses and distances around and not go over or through it. This brings us naturally to the other question; what is the bed of a river? It is said this is a question for the court, but I think the jury know about as much in regard to it as the court can know. Of course, the bed of the river, in the usual acceptation of the term, means its customary channel. It does not mean the place where the river sometimes runs, but where it naturally and generally runs. For this reason the bed of a river, while it cannot include an island such as I have described, may include a sand bar, or a gravel bar, or a mud bar; the distinguishing characteristic of an island being that it

has soil to sustain vegetation, this contradistinguishing it from a mere bar without soil. The one would be an island, the other conditions being fulfilled; the other would be a part, perhaps, of the bed of the river, and not an island.

You have heard the witnesses on both sides in regard to this subject; it is your province and duty to say what was the truth in 1848 in regard to this alleged island. Was there an island there? Was it at least four feet high above low water mark? Were forty perches of it susceptible of cultivation in grain or esculent roots, in common seasons, by their growing and becoming maturely ripe? You have heard the testimony of Dr. Ingham, who located the river warrant, who says that he found no such island. You have heard other testimony bearing on the general question how much of an island existed. You have heard the evidence on the part of the plaintiffs in rebuttal; it is not necessary that I should go over it in detail. There is a discrepancy in statement in regard to the size and character of this alleged island as it existed in 1848, and it will be for the jury acting under the obligations of their oaths and guided by the testimony, to say what was the truth, because the finding on that question is important in determining the final result of this controversy. Further, we say to you, if you believe, under the evidence, this was not an island, but a mere sand bar, then it would be, under the statute, part of the highway, and the bed of it would be the bed of the river, and might be taken up. We say further, if you find there was an island there in 1848, in contemplation of law, it would be also necessary for you to ascertain from the evidence how many acres it contained; in other words, how much of it was not a part of the bed of the river in 1848, because as to all of it which at that time was a part of the bed of the river the defendants have shown good title.

I am requested to charge you upon certain points submitted by the respective counsel, which I now read and answer:

Plaintiffs' first point. That as to all the defendants but the Pennsylvania Coal Company, the verdict must be for the plaintiffs.

That point we affirm.

Plaintiffs' second point. The plaintiff has shown title to the land described in the writ, and is entitled to recover possession of the

same against the Pennsylvania Coal Company, if the jury believe that the said land was above low water mark in 1848.

That point we affirm, with such qualifications as you will find in our general charge.

Plaintiffs' third point. The act of 1848, under which the said company claims title, conferred no power to sell rights under land not in the bed of the river, and if the jury find that the land in dispute was in fact not in the bed of the river in 1848, but was an island above low water mark, the plaintiffs are entitled to recover.

That point we affirm.

Plaintiffs' fourth point. If the jury find that in 1848 there was an island in the bed of the river called Wintermoot Island, and that the same contained forty perches of arable land, exclusive of rocks, four feet above low water mark, then the river warrants laid out by Dr. Ingham should have stopped at low water mark, around the shore of the island, and no part of the land above low water mark could be affected by the surveys and patents under which defendants claim, and the verdict must be for the plaintiffs for so much land as was above low water mark at that time.

We have practically affirmed that point in our general charge, carefully guarding, however, the question of fact, which is for the jury. Referring to our general charge in this connection, we affirm the point.

Plaintiffs' fifth point. The jury may find for the plaintiffs under the evidence, for the land described in the writ, being the Winchester and Culver survey, or for so much thereof as they may believe was not in the bed of the river in 1848, defining the amount in such a way as to render its identification possible.

That point, under our view of the case, we think is substantially correct, and is affirmed.

Defendants' points submitted, are as follows :

I. That the rights granted under the act of 1848 amount to a fee in the underlying coal and other minerals.

That point we affirm.

II. That no matter what was the condition of Wintermoot Island at the date of defendants' warrants and surveys, the title

being still in the commonwealth, the grant of the commonwealth to defendants was conclusive against her, and she could make no further conveyance to affect such grant, islands not being excepted under the act of 1848.

That point we decline to affirm.

III. That the commonwealth itself having separated the mineral and surface estate, the doctrine of accretions could not apply to an island granted after the date of our warrants.

That point we affirm. If an island existed in 1848, it is that, and not the island as affected by accretions since, which fixes the bed of the river for the purposes of this case.

IV. That under the act of 1848, all the area included within lines beginning at a point designated in these warrants at low water mark on the bank of the river, pursuing the course of said river at low water mark as designated in said warrants, then at right angles across said river at low water mark, and thence along the other shore of the river at low water mark to a point opposite the place of beginning, thence across said river to place of beginning, is the bed of the river, and a warrant therefor embraces all islands, bars, and sand banks not granted by the commonwealth prior to the date of such warrants.

That point in its length and breadth we cannot affirm; a portion of it might have been affirmed if it stood alone. We decline to affirm it.

V. That, under the evidence in this case, the plaintiffs are entitled to recover only for the surface of the land described in the writ, and the jury must find for the Pennsylvania Coal Company, one of the defendants, the coal and other minerals under said surface.

That point we decline to affirm, and refer to our general charge.

As we have said to you, gentlemen, plaintiffs have shown themselves entitled to your verdict for the surface. About this there is no controversy. We have also said to you, that although the writ in this case describes thirty-seven acres, it will be incumbent upon you to find how much of this thirty-seven acres under the views given you, already existed in 1848, and to say, if you find for the plaintiffs, how many acres do you find for them; and as to all for which you do not find in favor of the

plaintiffs, you will say you find for the defendant, the Pennsylvania Coal Company. This may seem a little complicated because of the peculiarity of the case, but I think you comprehend it. As to the surface there is no dispute; for that the plaintiffs are entitled to a verdict. Whether or not they are entitled to recover further, depends upon what you believe in regard to the testimony. You have a right, if you find for the plaintiffs at all, to find for the whole amount described in the writ, to-wit, thirty-seven acres. Or you may find for such portion of it as you believe, under the general instructions we have heretofore given you, was not properly included in the surveys of 1848 and 1849, which the defendants hold. Thus you may, under certain views of the evidence, find in your verdict a portion of the land for the plaintiffs and the rest for the defendants.

Believing these to be all the instructions necessary for the court to give you, we leave the case in your hands.

Before the rendition of the verdict in foregoing entitled cause, defendants' counsel excepted to the charge of the court therein and answers to points, and requested that the whole be reduced to writing and filed of record in the cause.

D. L. Patrick, Q. A. Gates, George K. Powell, and H. W. Palmer, for plaintiffs.

A. H. McClintock and H. M. Hoyt, for defendants.

Franklin Carroll Mosier was born October 8, 1846, in the township of Pittston (now borough of Hughestown), Luzerne county, Pa. His great-grandfather, Johannes Mosser, was a native of Germany, and arrived in this country October 13, 1766, in the "ship Betsey, John Osmond master, from Rotterdam, last from Cowes." He was quite young when he arrived in this country, and settled in Northampton county, Pa. His name appears on the roll of Captain Miller's company as John Moeser (enlisted in Northampton county), of Colonel William Thompson's Battalion of Riflemen, which was the first quota of volunteers raised in Pennsylvania for the defense of the Colonies. These troops marched to Cambridge, Mass., and participated in

the siege of Boston, which was evacuated by the British forces March 17, 1776. Colonel Thompson's command, prior to above date, became the "First Regiment of the Army of the United Colonies, commanded by His Excellency General George Washington, Esquire, general and commander-in-chief," and "the First Pennsylvania Regiment" of the Continental line, which fought under Washington from the siege of Boston to that of Yorktown. During this long, sanguinary period the paternal great-grandfather of the subject of this sketch was a true patriot and faithful soldier, and served his adopted country without pay or reward. Referring to Volume I. of Pennsylvania Archives, we find on page 338 that John Mosier's depreciated pay escheated to the state. His son, John Mosier, was a tailor by trade, and was born in the vicinity of Easton, Pa. The son of John Mosier and father of F. C. Mosier is Daniel Dimmick Mosier, who was born in Middle Smithfield township, Monroe county, Pa., in 1816, but came to Luzerne county at about the age of fifteen or sixteen. The wife of John Mosier is Sarah Overfield, a daughter of Martin Overfield, who was a descendant of one of the early settlers of Monroe county. She resides on the Mosier homestead in Middle Smithfield, within a short distance of where she was born. She is nearly a centenarian in age, and is still strong and vigorous in mind and body. William Overfield, who was one of the canal commissioners of Pennsylvania, was her brother. In the year 1794 Benjamin Overfield and Paul Overfield, brothers of Martin Overfield, settled in Luzerne (now Wyoming) county. Paul Overfield married a daughter of Nicholas De Pui, of Monroe county. She was in the Wyoming Valley at the time of the battle and massacre of Wyoming, but her life was saved by a friendly Indian acquaintance who secreted her among the rocks. Nicholas Overfield, son of Paul Overfield, became one of the most prominent citizens of Wyoming county. He was associate judge of the county from 1851 to 1856, and represented Luzerne county in the legislature before Wyoming was set off. He married Harriet, daughter of Samuel Sterling, who was the grandfather of Walter G. Sterling, of this city. Moses Overfield, brother of Nicholas Overfield, was a justice of the peace for twenty years, and was the first to represent Wyom-

ing county in the state legislature. Daniel Dimmick Mosier is a prominent citizen of the borough of Hughestown. He has filled various local offices, and was for ten years a justice of the peace for Pittston township. The wife of D. D. Mosier and the mother of F. C. Mosier is Elizabeth Ann Mosier (*nee* Ward), a native of Trumbull, Fairfield county, Conn. Her grandfather, Thomas Ward, emigrated from England and settled in Connecticut with his wife, Anna, whose maiden name was Wakely. Her father was Victor Ward, a soldier in the war of 1812. The mother of Mrs. Mosier was Anna Sherwood Mills, daughter of Robert Mills. His wife was Desire, a daughter of Jonathan Robertson, of Weston, Fairfield county, Conn., who was a soldier in the old French and colonial wars. Her sister, Elizabeth, was the wife of Sergeant Thomas Williams.

F. C. Mosier was educated at Wyoming Seminary and the University of Michigan, at Ann Arbor in that state. In 1862, when not quite sixteen years of age, he enlisted in Company H, Nineteenth regiment of Pennsylvania Militia, during the Antietam campaign. Returning home, he remained on his father's farm until 1865, when he became a clerk in the store of the Lackawanna Iron and Coal Company, at Scranton. During the five years that he remained in the employ of that corporation he discharged his duties with fidelity, and was offered a prominent position if he would remain in their employ. He, however, determined to study law, and began his studies with his brother-in-law, the late Conrad S. Stark, of Pittston, and was admitted to the Luzerne county bar February 26, 1874. He has served as a member of the town council of the borough of Pittston, of which body he was elected president, and made an impartial and efficient public officer. He has also been their attorney. In 1882 he was unanimously nominated as the democratic candidate for representative in the Seventh legislative district, composed of a portion of Luzerne and Lackawanna counties, but was defeated by James L. McMillan, the republican candidate, the vote standing, McMillan 1,761, Mosier 1,431, and J. C. Miles, prohibitionist, 25. In 1884 he came within a vote or two of receiving the democratic nomination for congress in the Twelfth congressional district of Pennsylvania. Mr. Mosier is still an unmarried man,

It is the fate of many of the profession of the law to aspire to conspicuous positions in politics. That this is so is but natural. Those whose studies have made them familiar with the law in all its various phases develop, almost of necessity, the desire to exert a special influence in the making of the law, or its administration. Lawyers are the fittest legislators, though we concede the wisdom of the custom that brings representatives of almost every profession and calling to a seat and voice in law-making bodies—and a very large percentage of our most distinguished men in legislation and state craft come to their honors from practice in the courts. Mr. Mosier has shared the aspiration spoken of, and was rewarded with the nomination of his party for the state house of representatives in the Seventh or Pittston legislative district in 1882, but the district is largely republican and he failed of election. He has always been an ardent democrat, and his counsel is in demand by his fellow partizans at all times. He is equally ambitious as a lawyer, and has acquired a paying practice, to which he gives loyal care and consideration.

Howkin Bulkeley Beardslee who was admitted to the bar of Luzerne county, April 16, 1874, is a native of Mount Pleasant, Wayne county, Pa., where he was born April 15, 1821. His father, Bulkeley Beardslee, was a native of Fairfield, Fairfield county, Conn., and removed to Wayne county in the early part of the present century. His name first appears in the assessment list of Mount Pleasant township in 1818, as the owner of a house and farm. The wife of Bulkeley Beardslee was a daughter of Walter Kimble, who was a son of Jacob Kimble, and one of the earliest settlers on the Paupack. He, with others, was driven out of the settlement about the time of the Wyoming massacre, and did not return until after the revolution. He died in 1826, aged ninety-one years. Bulkeley Beardslee was a prominent citizen of Wayne county and held several offices, one being that of a commissioner of the county. From 1845 to 1848 the subject of this sketch was register and recorder of Wayne county; in 1860 a representative to the legislature from the same county,

and in 1864, 1865 and 1866 a state senator. He edited and owned for many years the *Wayne County Herald*. In 1871 he removed to this city and became the editor and part proprietor of the *Luzerne Union*, and subsequently its sole owner, which he carried on for a number of years. He is now the editor and proprietor of the *Luzerne County Herald*, which he established in 1882. His wife is Charlotte, a daughter of the late William Clark of Abington township, Lackawanna county, Pa. In 1799 Deacon William Clark, (the grandfather of Mrs. Beardslee), and family, including his three sons, William Clark, the father of Mrs. Beardslee, Jeremiah Clark, John Clark, Thomas Smith and Ephraim Leach came from Plainfield, Conn. They crossed the Leggett mountain at a gap westerly from where the road now passes, their team being one poor horse, and their conveyance a drag made of poles fastened at the back of the horse. On this drag were placed a sap kettle, their axes and a few clothes and provisions. These adventurers found their way to a spot near the residence of Mr. Wall, upon which they made their camp on March 15, 1799. During the summer and fall they made clearings in several places and opened a path through Leggett's Gap. Deacon Clark settled at what is now Clark's Green, where he made the first clearing. This for many years was known as the "Green," and from it the settlement was named. The village has two churches and several thriving business concerns. The early settlers of Abington suffered from the incursions of beasts of prey, which often confronted them, especially in Leggett's Gap, while making their frequent trips to the mill in Slocum Hollow, now Scranton, or visiting the different settlements. "Many a time," said Mr. Leach, "in passing through the notch with my little grist upon my shoulders have I kept the wolves at bay with a long club which I kept swinging vigorously as they came growling around me, and to my faithful club, often bitten and broken, have I been indebted for my life." About seven years after the first settlement the outlook was quite promising, but the nearest market was Wilkes-Barre, twenty-five or thirty miles to the south, with only a single pathway leading to it through a dark extent of forests. The wife of Deacon William Clark was the first white woman in Abington. On May 22, 1802

the first Baptist church was formed in Abington, at the house of Deacon Clark, and Deacon William Clark and his wife became members. Rev. John Miller, the grandfather of Jerome G. Miller, became their pastor, and continued as such until 1850, when Rev. Andrew Hopper became associated with him at his request.

Mr. Beardslee's life has been an active one, though cast more in the political and journalistic field than in the line of his profession. As stated, he has been register and recorder of Wayne county, and representative in the lower house of the state legislature and senator from the district of which it formed a part. His service in the latter capacity was during one of the most exciting periods of the country's history, 1864 to 1866. In the former year there was for a long time a tie in the body under the following circumstances: The senate then consisted of thirty-three members. Of the senators elected sixteen were democrats and seventeen republicans, but one of the latter, General Harry White, who represented the Indiana district, was at the time in a confederate prison. In the contest for political supremacy, such things are always taken advantage of. The democrats on this occasion resisted, through several weeks, the election of a republican speaker. Mr. Beardslee was one of the sixteen of the democratic faith, and his name beginning with B, and the roll being made up, under the rule, in alphabetical order, he happened to be the first democrat whose name was called to vote. This, in view of the numerous parliamentary dodges and contrivances always resorted to in such contests, made his position one requiring the exercise of great watchfulness and caution. That he carried himself through the ordeal without hesitation or error is no small compliment to his sagacity. Mr. Beardslee's tastes led him to abandon practice for journalism. As editor of the *Wayne County Herald* and *Luzerne Union*, he did valiant battle for his party for many years. For a long time the latter was the only democratic journal printed in English in this great county, (which then included Lackawanna,) and it was therefore the organ of the party, and looked to by the rank and file as their guide in its policies and purposes. It is not too much to say that the *Union* discharged this responsibility with commendable wisdom and vigor. The *Union* was also a clean and enterprising family jour-

nal, the sole reliance of hundreds of citizens, especially in the rural districts, for the news of the day. Since the merging of the *Union* with the *Leader*, under the name of the *Union-Leader*, Mr. Beardslee has been publishing the *Luzerne County Herald*, a weekly publication, issued at Wilkes-Barre, democratic in politics, but devoted mainly to miscellaneous family reading. Mr. Beardslee is a gentleman of much energy of character, well read, a pithy writer, a good controversialist and is possessed of other traits which make it certain that he might have achieved a leading position at the bar had his ambitions not been turned to other fields.

John Vaughan Darling was born in Reading, Pa., July 24, 1844. He is the youngest son of his father, William Darling, and is the brother of Edward Payson Darling of the Luzerne bar. Mr. Darling was prepared for college by Prof. Kendall, and passed his examination, for the junior year, at Harvard University, but his health failing him, he gave up the idea of a collegiate education. In his early years he was a frequent contributor to the columns of *Lippincott's Magazine* and the *Atlantic Monthly*, and for five years was assistant editor of the *North American Exchange and Review*. Mr. Darling read law with R. C. McMurtrie, of the Philadelphia bar, passed his examination before he was of age, and was admitted to the Philadelphia bar in 1865. Soon after his admission he went into partnership with Morton P. Henry, which continued until his removal to this city in 1874. He was admitted a member of the Luzerne bar, June 4, 1874. In 1869 he was retained as junior counsel with James E. Gowen for the Lehigh Valley Railroad Company, which exhibited his standing as a young lawyer. Mr. Darling married, October 9, 1872, Alice Mary, youngest daughter of Andrew T. McClintock of the Luzerne bar. Mr. and Mrs. Darling have no children. Mr. Darling came to the study of the law with a liking for it and a conviction that to excel he must apply himself steadfastly, not only to mastering of the principles, but to acquiring familiarity with the rules of practice and every fact material to the consideration of a case at issue. This is a natural and neces-

sary inference from the active, diligent and yet deliberate course for which he is noted. None of our lawyers are more conscientious in this regard, and consequently few are in as great demand among clients whose causes involve delicate questions and important interests. Nobody who knows the man would think of associating his name with a trivial case, and yet we suspect that, however inconsiderable the consequences embraced, he would enter upon its elucidation with the same cautiousness and painstaking that characterize his dealings with more important trusts. Singly, and in connection with his brother, whose biography has already been published in connection with this series, he has been concerned in many a *cause célèbre*, both in the local and in the Supreme court, and with results in every respect satisfactory to the sides upon which he has been enlisted. Mr. Darling makes no pretensions to oratory, but his reasoning is lucid and forcible and his delivery smooth and pleasing, and these are the characteristics that plead most successfully to the unfettered judgment. Besides being a good lawyer, Mr. Darling is a gentleman in the best acceptance of the term. He is liberally informed in general literature and in all subjects of current interest. He takes only a watchful citizen's interest in politics and is one of the few of the fraternity who have never been suspected of hungering for official honors, though he would manifestly make his mark in a legislative body or grace the judicial bench.

Nisbet says, "They of the surname of Dickson, as descended of one Richard Keith, said to be a son of the family of Keith Marischal, took their name from Richard (called in the south country Dick), and to show themselves descended of Keith Earl Marischal they carry the chief of Keith." The first of the family of Dickson, of Hartree, in Lanarkshire, was John Dickson, an eminent lawyer. Of the same family was the Reverend David Dickson, born in 1583, and son of a John Dickson, who was a wealthy merchant in Glasgow. David was one of the regents of the University of Glasgow. In 1639 he was moderator of the general assembly, and in 1650 he was elected to the

professorship of divinity at Glasgow. He took an active part in the various controversies of that day. At the time of the restoration, for declining to take the oath of supremacy, he was ejected from his professorial chair. He wrote many scriptural and theological expositions and treatises, and died in 1663. His grandson, John Dickson, was born about 1673, and having married Jane Dodd, emigrated to Ireland and settled near Rathfryland, in county Down. They had four children, all of whom lived to be married. James, the eldest son, had eleven children, of whom Alexander, the fourth son, and grandfather of the subject of this sketch, was born in 1776, at the homestead. He took part in the Wolf Tone rebellion of 1798, under the leadership of the Rev. William Dickson, a cousin. This William was a general in the rebel ranks and a man of learning and probity, who suffered for his part in this action by prolonged imprisonment and banishment. Alexander was for a time forced to hide, on the downfall of the rebellion. In 1799 he emerged from his retreat and was married to Sarah McKee. They had ten children born of this marriage, nine of whom lived to maturity and were married. The wife died in 1819, and in 1820 he married Margaret Harring, by whom he had six children. In June, 1827, he brought his family to America and settled on a farm in Schaghticoke, Rensselaer county, N. Y. In 1837 he removed to Lansingburg, N. Y., and died there, on Sunday, April 2, 1871, in the ninety-fifth year of his age. Hugh Sheridan, the seventh child of Alexander, was born in 1813 and was fourteen years old when he arrived in America. Being of a studious and ambitious disposition, and having a determined will, he gained (largely by his own efforts) a thorough education. His father having a family of fifteen children who lived to maturity, was unable out of the proceeds of his farm to provide for them all an education in more than the common school branches. Hugh graduated at Union College in 1839 and at Princeton Theological Seminary in 1841. Having been ordained he assumed the charge of a church in Louisville, Ky., from whence he moved to Fort Wayne, Ind., and during his pastorate there was married on September 2, 1845, in Philadelphia, Pa., to Sarah Margaret Stoeber. She was also of ministerial descent. The first of her ancestors who

came to America was Rev. John Casper Stoever, who was born in Frankenberg, Saxony, December 21, 1702. He was the son of Deitrich Stoever and of Magdalena, daughter of Rev. Andrew Eberwein. In 1728, John Casper, after a pastorate of five years in Anweiler, Bavaria, came to America as chaplain to a party of emigrants. It is a singular coincidence that on the same vessel that brought over Mr. Stoever there was Sebastian Dorr the ancestor of Andrew F. Derr of the Luzerne county bar and Philip Heinrich Soller, the ancestor of George B. Kulp. In 1733, Mr. Stoever was preaching the gospel in Lebanon, Pa., and in 1740 became the first regular pastor of the Lutheran church in Lancaster, Pa. He married Maria Catharine Markling. They had eleven children, eight of whom survived him. He died May 13, 1779. Frederick, the youngest son of John Casper Stoever, was born in 1759, and married Margaret Dinshert. Eight children were born to them, five of whom survived him. He died in 1833. Their eldest son, Frederick, was born in 1784, and died at West Chester in 1867, in his eighty-third year. He married Sarah Reigart. He was a prosperous merchant during all his mature life in Philadelphia. They had three children: Elizabeth, intermarried with Huizinga Messchert—now dead; Jefferson, now dead, and Sarah Margaret. The latter was born in Philadelphia in 1824. She married Rev. H. S. Dickson, D.D., in 1845, as above stated. They had four children, two daughters and two sons. The eldest daughter, Elizabeth, married the Rev. Samuel T. Lowrie, D.D., son of Judge Walter Lowrie, of the Pennsylvania Supreme court. The second daughter, Ellen, married Col. W. P. Wilson, of Potter's Mills, Centre county, Pa. He was a grandson of Hugh Wilson, who was one of the founders of the Irish settlement at Bath, Northampton county, Pa., and a son of Dr. William Irvine Wilson, whose wonderful energy, courage and devotion in the practice of medicine throughout Penn's Valley during its early history, and whose cheerful and profuse hospitality at his home, at Potter's Mills, made him famous and beloved by all of his many friends and acquaintances. He died at Bellefonte, on September 22, 1883, in his ninetieth year. Col. Wilson served throughout the war on the staff of Gen. W. S. Hancock, and remained in the regular

army until 1870, when he resigned his commission and has since been engaged in business. The eldest son, Frederick Stoevers Dickson, married Helen Hickman, daughter of John Hickman, whose record as member of congress in the fierce and bitter political struggle which preceded the resort to arms in 1861, is matter of well known history. Mr. Dickson is the author of Dickson's Blackstone, an analysis of Blackstone's Commentaries, and Dickson's Kent, an analysis of Kent's Commentaries. The youngest son is Allan Hamilton Dickson, who was born November 14, 1851, at Utica, N. Y. He was prepared for college at Weyer's preparatory school at West Chester, Pa., and entered Yale College in September, 1868. He remained there until February, 1870, when an attack of sickness caused him to leave college. From March until December of the same year he spent in New Mexico as the guest of his brother-in-law, Colonel Wilson, who was there, and assigned to duty as an Indian agent. In January, 1871, he again entered Yale and remained there until July, 1871, passing his sophomore annual examination and then received an honorable discharge from the junior class. Soon thereafter he went to Germany and remained in Heidelberg for five months, learning the language, and then went to Berlin, where he took lectures in the University. He then travelled through Switzerland and Italy and returned home at the close of 1872. In January, 1873, he came to Wilkes-Barre and entered the office of ex-Governor Henry M. Hoyt, as a student at law, although he had previously entered his name as a student in the office of Wayne McVeagh at West Chester. He was admitted to the Luzerne county bar September 14, 1874.

The wife of Mr. Dickson, whom he married November 12, 1874, is Catharine Swetland Pettebone, daughter of Payne Pettebone, of Wyoming, Pa. Mr. Pettebone is a descendent of John Pettebone, of French extraction, who emigrated from England during the turbulent time of Oliver Cromwell, and was registered as a landholder in Windsor, Hartford county, Conn., in 1658. On February 16, 1664, he married Sarah Eggleston, by whom he had nine children, three born at Windsor and six at Simsbury in the same county, where he removed about the time of the birth of his son Stephen, which occurred October 3, 1669, loca-

ting on lands now in possession of some of his descendants. The name of Noah Pettebone is found attached to a petition to the assembly of Connecticut, dated March 25, 1753, for permission to buy lands of the Indians on the Susquehanna at Wyoming. In 1745 he married Huldah Williams, by whom he had eight children, all born in Connecticut. He was first at Wyoming in 1769 with his three sons, Noah, jun., Stephen and Oliver. In 1772 he settled on meadow lot number twenty-two, where his descendants have continued to reside in regular succession to the present. Sometime after the massacre of July 3, 1778, he returned to Connecticut and Massachusetts, where his married daughters resided, but after a year or two returned to the homestead at Wyoming, where he died March 28, 1791. Among the children of Noah Pettebone, all born at Simsbury, were Noah Pettebone, jun., born in November, 1751, married Lucy Scott, May, 1778, and was killed in the battle of Wyoming, July 3, 1778; Stephen Pettebone, born in September, 1755, was in Sullivan's army and honorably discharged, and after returning to Wyoming was killed by Indians February 10, 1779, on Kingston flats, and Oliver Pettebone. He was the youngest son of Noah Pettebone, born May 13, 1762, and was but a boy of sixteen at the time of the massacre, and was with others in Forty Fort. He counted the force as it went out, and made the number three hundred and eighty-two. The second day after the massacre he returned to Connecticut, but removed to Amenia, N. Y., where, on December 21, 1783, he married Martha, daughter of Barnabas Paine, M. D. He settled on Livingston manor where three children were born, Oliver Pettebone, jun., Esther Pettebone, and Payne Pettebone. He returned to Wyoming in 1788, and purchased the lot adjoining his father's homestead, both of which lots are owned and occupied by his descendants. After his return to Wyoming ten additional children were born to him, and all except two, who died young, raised large families. He was a prudent, industrious and systematic farmer, and died March 17, 1832. From 1802 to 1805 he was one of the commissioners of Luzerne county. His wife died December 25, 1833. Payne Pettebone, son of Oliver Pettebone, was born January 24, 1787. He married Sarah Tut-

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tle, a granddaughter of Henry Tuttle, who was a native of Basking Ridge, Somerset county, N. J. He was born November 24, 1733, and removed to Wyoming in 1785, and settled near Forty Fort. He bought of Col. Nathan Denison a mill property and farm on Abraham's creek, at a point since known as Tuttle's mill, where the settlers on their way to the battle of Wyoming stopped for deliberation. Mr. Tuttle represented his father as being of English and his mother of Scotch nativity or parentage. Joseph Tuttle, the son of Henry Tuttle, and the father of Mrs. Pettebone, was born in Rockaway, Morris county, N. J., January 19, 1772, and removed with his father to Wyoming in 1785. He was of active business habits as farmer, miller, drover, butcher and merchant. The last named business he carried on several years in connection with his son, Joseph B. Tuttle, at Tunkhannock, Pa. Though of limited education, he took an active part in public affairs, held various town offices, and from 1832 to 1835 was one of the commissioners of Luzerne county, and was highly esteemed as a citizen. He married September 26, 1792, Mary, daughter of Jesse and Sarah (McDowell) Lee, who was born at Stroudsburg, Pa. Her parents removed to Wyoming before the massacre July 3, 1778, and settled on the farm on which the Wyoming Monument, erected over the common grave of the slain settlers, now stands. Jesse Lee was from Connecticut. His wife, Sally McDowell, was a daughter of John McDowell, a Scotch-Irishman, who came to this country in 1735, and Miss De Pui was a descendant of Nicholas De Pui, a Huguenot refugee, who settled in the Minnisink region in 1725. Payne Pettebone, (father of Mrs. Dickson,) son of Payne Pettebone, was born in Kingston, December 23, 1813. When but eight months of age his father died and he was left to the care of his maternal grandfather, Joseph Tuttle, where he remained until he was fourteen years of age, doing the varied and almost ceaseless work of a farmer's boy, and attending the winter school in the old school house with slab benches, located near the residence of R. C. Shoemaker, his studies being limited to Webster's spelling book, Daboll's arithmetic, the old English reader and the rudimentary principles of Murray's grammar. He subsequently became a clerk, and at the age of twenty-one a partner of William Swet-

land in his store at Wyoming, which continued until the death of Mr. Swetland in 1864. With the various local interests of the town in which he lives, Mr. Pettebone has always been closely identified, and all enterprises having in view the education, evangelization and general advancement of his fellow men have always found in him a willing and liberal supporter. He has never held public office, except those of a local character. In 1844 he was appointed a member of a committee with General William S. Ross and J. J. Slocum by the state authorities, for the sale of the Delaware division of the Pennsylvania canal, and aided materially to effect the sale of the same to the city of Philadelphia. From 1854 to 1863 he was treasurer of the Lackawanna & Bloomsburg Railroad Company, during the trying years of the financial embarrassment of that corporation, and the construction of the road. During that period there occurred the severest strain and pressure of his business life, and he retired from his position only when safety from loss was assured to the managers of the road, who were chiefly neighbors and friends of his. He was subsequently elected a director of the railroad company and continued in that office until the Lackawanna & Bloomsburg Railroad was consolidated with the Delaware, Lackawanna & Western Railroad Company. Mr. Pettebone has been prominently concerned in various other businesses and many benevolent, scientific, and educational enterprises, representing several as president. Among them may be mentioned the old Pittston Bank, the Wyoming Shovel Works, of which himself and son (Robert Treat Pettebone) are sole proprietors, the Wyoming Terra Cotta Works, board of trustees of the Wyoming Seminary, Wyoming Bible Society, Wyoming Camp-meeting Association, Forty Fort Cemetery Association, and Wyoming Historical and Geological Society. He is a director of the Washington Life Insurance Company of New York, the First National Bank of Pittston, the Wyoming National Bank and Miners' Savings Bank of Wilkes-Barre, and was also president and director of the Wilkes-Barre Saving Bank. He is a trustee of the Drew Theological Seminary, and resigned the trusteeship of the Wesleyan University at Middletown, Conn., from inability to attend the meetings of the board. Until 1864 the Wyoming Monu-

ment grounds remained in a neglected condition. At a meeting of the Wyoming Historical and Geological Society that year, it was resolved "that Payne Pettebone, Hon. William S. Ross, and Col. Charles Dorrance be a committee to collect funds to defray the expenses of finishing the Wyoming Monument, and enclosing and improving the grounds of the same." His duties on the committee Mr. Pettebone discharged with his accustomed ability, energy and success. In 1878 he was chairman of the committee on finances of the Centennial Memorial Association and to his management was the success of the enterprise in no small measure due. A pleasant incident connected with this event, was the entertainment, at the residence of Mr. Pettebone of President Hayes and his family and cabinet, Governor Hartman and his wife and *suite*, and many other prominent men of the state and Nation. To the varied employments above mentioned, which have demanded his time, personal attention and financial support, from time to time, have been added the care of interests in coal mines, farming operations and an extensive sugar plantation in Louisiana. Mr. Pettebone connected himself with the Methodist Episcopal Church at the age of thirty-five years, and as a member of the church since that time has been continually in the official board, serving in the several departments as leader, steward, trustee, Sabbath school superintendent and delegate to the general conference. The Wyoming Methodist Episcopal Church, which was dedicated July 18, 1883, was the gift of the Pettebone family to that society. It is a beautiful edifice, costing \$25,000. Of this sum Mr. Pettebone and wife contributed four-fifths and his mother-in-law, Mrs. Swetland, one-fifth. Henry Pettebone, who was admitted to the bar of Luzerne county, August 3, 1825, and who was Prothonotary, Clerk of the Orphans' Court, clerk of the Quarter Sessions and Oyer and Terminer from 1830 to 1836, and one of the associate judges of Luzerne county, from 1845 to 1850, was an uncle of Payne Pettebone. The wife of Payne Pettebone is Caroline M. Swetland, eldest child of the late William Swetland, of Wyoming. Mr. Swetland was a descendant of Luke Swetland, one of the Connecticut settlers of Wyoming, and one of the proprietors under the Connecticut claim, who signed the agreement dated June 20, 1776,

and by the advice of the proprietors committee "pitched" on land some thirty miles above Wyoming, near Mehoopany, where the family settled after returning from their old home in Kent, Litchfield county, Conn., where they had taken refuge during the war. In the winter of 1777, Luke Swetland was a member of Captain Durkee's independent company of patriots encamped at Morristown, N. J., having enlisted while a resident of the valley, September 17, 1776. At the time of the battle of Wyoming on account of some disability, he was in Forty Fort, and did not participate in the engagement. On August 25, 1778, he was captured with a neighbor, Joseph Blanchard, by the Indians at the mouth of Fishingcreek, and remained for a considerable period a prisoner at different Seneca villages in the state of New York. In 1800, he removed with his family from Mehoopany to the old Swetland farm at Wyoming, where he died, January 30, 1823. "In later days," wrote Charles Miner, "I knew and could not but esteem the good old man. His taste and pride took a right direction and were of much value to the settlement. I refer to his establishment of a nursery for fruit, and his introduction from New England of various kinds of apples, selected with care. He was born January 16, 1729, in Lebanon, Windham county, Conn. and married Hannah Tiffany, of that place, April 1, 1762. She died January 8, 1809. Belding Swetland, the eldest son, was born January 14, 1763, and was with his father in Forty Fort at the time of the battle of Wyoming. He married Sally Gay, in Sharon, Conn., in 1787, and died at Wyoming, July 22, 1816. William Swetland, the oldest child of Belding Swetland, was born in Sharon, Litchfield county, Conn., June 26, 1789. He accompanied the family to Kingston, thence to Mehoopany and thence to the Swetland homestead in Wyoming, where his early life was passed as a farmer's son with very limited opportunities for education. About 1812, he engaged as assistant in the store of Elias Hoyt, in Kingston, doing odd jobs and making himself generally useful. In 1815, Mr. Swetland erected the old portion of the stone building on the homestead, and engaged in trade on his own account with a capital limited to \$300. About a year later his father died leaving twelve children and the farm to William, with provision for the support of his brothers and sisters dur-

ing their minority and the payment to each of a specific sum upon their arrival at majority, a responsibility which, while it was cheerfully assumed as a duty by the young merchant, could not have been otherwise than onerous. Continuing in the mercantile business, which was from time to time enlarged and extended at the old stand, he had as a partner from 1830 to 1832 David Baldwin, and from 1834 to the time of his death, Payne Pettebone. On Abraham's creek, in the notch of the mountain, on the road from Wyoming to Northmoreland, Mr. Swetland had a grist mill, a saw mill, and a distillery, the products of which were sent by teams to the localities of improvements and business operations in all directions, commercial relations having been established by Mr. Swetland with various portions of Luzerne, Wyoming, Lackawanna, and Wayne counties. The distillery was closed about 1840; the mills were exchanged for coal lands on the Lackawanna in 1846. The customers at his store for many years came from Mehoopany, Meshoppen, Skinner's Eddy, and other points in Wyoming county, from various parts of Luzerne county, and to a considerable extent from the valley of the Lackawanna. At different dates during his business life Mr. Swetland was engaged in other important enterprises. In the early period of the history of the Lackawanna & Bloomsburg railroad he was president of the board of managers for several years, joining with others in pledging large sums in aid of the enterprise during days of great financial uncertainty. He was president of the Pittston Bank, established under the old state banking laws, and subsequently a director of the First National Bank of Pittston. He was efficient in the organization of the Forty Fort Cemetery Association, and was chosen its first president. Mr. Swetland was reared in the democratic school politically, and was an earnest and generous contributor to the success of that party, giving largely towards the establishment of the *Republican Farmer* in Wilkes-Barre, a once prominent advocate of democracy. From 1828 to 1831 he was one of the commissioners of Luzerne county. In conjunction with Andrew Bedford, M. D., and George W. Woodward, he represented Luzerne county in the constitutional convention of 1837; but becoming impatient at the slow progress of the deliberations of that body, he resigned before the close of the session, and E.

W. Sturdevant was elected to fill the vacancy. He voted the democratic ticket until 1860, when he became a republican. At the age of fifty-nine he connected himself with the Methodist Episcopal church, and was ever afterwards an active and liberal member of the church of his choice, and most of the time an official, having served as trustee and steward, and in other capacities, and as president of the Wyoming Bible Society. In his will he provided for the repair and painting of the old Forty Fort Methodist Episcopal church. This was the first church erected in the Wyoming Valley, and was completed about 1807. When Bishop Asbury visited Wyoming in that year he preached in a grove near the site of the church, and the timber for which was already on the ground. A liberal contributor to all benevolent objects, he took a deep interest in Wyoming Seminary, and became a trustee of that institution. Becoming acquainted with Rev. Reuben Nelson, D. D., then principal, and noting the zeal, industry, and business sagacity with which he was managing the affairs of the seminary under adverse circumstances, Mr. Swetland's sympathy was aroused, and he became one of the most thoughtful and generous friends of the institution. When the buildings burned down in 1853 he decided to erect one of the halls (now known as Swetland Hall) at his own expense, and he made many other very considerable contributions towards the re-erection of the buildings, and the payment of the indebtedness of the institution thus incurred; and at the time when the burden of financial obligation which had so long and so grievously oppressed it was lifted, he gave the sum of five thousand dollars, one-half the sum required for that purpose, the check for the same being the last to which he ever signed his name. Mr. Swetland married, September 28, 1819, Catharine Saylor, daughter of Peter Saylor, M. D., of Northampton county, Pa., who bore him four children. He died September 27, 1864. Mr. and Mrs. Dickson have one child living, Dorothy Ellen. Mr. Dickson is one of the ablest of the younger members of the bar. A liberal education, long and close association with older men of established legal reputation, a natural aptitude for logic, and good general abilities have combined to fit him for any professional test to which he chooses to subject himself. His cases

have always been marked by careful preparation and accurate legal knowledge. He is a republican, but not always in harmony with the dominant power in the party, as was instanced in his support of John Stewart, the independent republican candidate for governor in 1882, and upon other occasions. He threw himself into the campaign mentioned with a vigor born of a sincere conviction that if an independent candidate could not succeed, his party needed the chastening of a defeat, and much of the success of that movement was due to his diplomacy and exertions. He has gone into local conventions for the sole purpose of preventing nominations he esteemed to be obnoxious to the best elements of the people, and though not always successful, has fought with a spirit and determination that, of themselves, evinced his sincerity. In all this he has not been himself an aspirant for any political office, though he is a member of the city council; and in that body he has been vigilantly watchful of the interests of his constituents and of the people of the city generally. He is a cultured man, fond of books, active in society and in various local charitable and other organizations, and in every other particular a good and useful citizen.

Court of Common Pleas of Luzerne County.

McCONNELL v. GORMAN.

A warrant of arrest in an action of trespass is returnable forthwith, and if bail is not given to the constable for appearance at a future day, he is bound to return his process accordingly, and the justice is authorized at once to proceed and hear the case.

Certiorari.

The opinion of the court was delivered December 8, 1887, by RICE, P. J.—The first three exceptions seem to be based on an erroneous impression as to the nature of the proceedings. The action was not in the nature of a summary conviction, but was a civil suit to recover damages in trespass, begun by warrant of arrest. In making the process returnable forthwith the justice had the express authority of the act of assembly; and as bail

was not given to the constable for appearance at a future day, he was bound to return his process accordingly, and the justice was authorized at once to proceed and hear the case. (See act March 20, 1810, P. D. 850, pl. 40.) A more explicit statement of the nature of the injury to the plaintiff's personal property would be desirable, but under the decided cases we cannot say that the record is fatally defective in this respect. See *Miller v. Savage*, 2 Luz. Leg. Reg. 191; *Winters v. Menig*, 2 Kulp, 428; *Youngblood v. Falkner*, *ibid*, 429.

The exceptions are overruled and the judgment affirmed.

BOOK NOTICE.

FEDERAL DECISIONS. Cases argued and determined in the Supreme, Circuit, and District Courts of the United States. Arranged by William G. Myer. Vol. VI., pp. 884. The Gilbert Book Company, St. Louis, 1885.

This volume and the succeeding one are devoted to the "Constitution and the Laws." Volume VII. has not yet come to hand. As soon as it does we shall probably review at greater length the work done by the editors in bringing together in so compact a form the most important and interesting decisions of all American jurisprudence. If volume VII. reaches the high standard of merit that undoubtedly characterizes volume VI., then it may unhesitatingly be recommended as the best and most fascinating work on constitutional law that has ever come from the press. There is not the vagueness and theoretical learning so frequently found in text books, but the freshness of actual contests in the forum, combined with the true spirit of uniformly exalted litigation in which no case is of mere personal interest to the litigants, but in which each is a supreme contest for a great principle. If Mr. Myer had set out to do nothing else than this one thing—to give the public two volumes upon this one subject—he would still, for them alone, deserve well of his brethren in the profession; for of the Reports of the Supreme Court of the United States, the cases which it is proposed to bring together here are the very soul. Whether a lawyer subscribes for the entire set of

Federal Decisions or not, let him make no pretense to ownership of a complete professional library unless these two books are on his shelves.

Volume VI. contains opinions from the pens of the most eminent of judges upon: 1st, The General Principles of Constitutional Law. 2d, Cases on the Powers of the State and Federal Governments, involving their relative rights; to Regulate Congressional Elections; Taxation; Political Assessments; Religious Liberty; Crimes; and other less conspicuous, but not less important matters. 3d, the Powers of the General and State Governments to issue Bills of Credit. 4th, Retrospective and Ex Post Facto Laws and Bills of Attainder. 5th, Due Process of Law. 6th, Privileges of Citizens. 7th, Equal Protection of the Laws. 8th, Regulation of Commerce, generally, and as this power involves rights, on navigable rivers; to tax for the transportation of passengers and merchandise; to regulate the taking of Private Property; to prevent discrimination by one state against another; to provide duties on tonnage, imports and exports, etc., etc. The typography is excellent, and the work is well bound.

In Saunders' report of the case of *Veale v. Warner*, after a statement of his argument for the defendant, he proceeds: "And of such opinion was the whole court, clearly. But they would not give judgment for the defendant, because they conceived it was a trick in pleading; but they gave the plaintiff leave to discontinue on payment of costs. And Kelynge, chief justice, reprehended Saunders for pleading so subtly on purpose to trick the plaintiff by the omission of the other part of the award. But it was a case of the greatest hardship on the defendant; for the bond of submission was only in the penalty of £2,000, and the arbitrators had awarded him to pay £3,100, being £1,100 more than the real penalty of the bond; when, in truth, there was nothing at all due to the plaintiff, but he was indebted to the defendant."

ERRATUM.—The name of Q. A. Gates as counsel for plaintiffs in *Winchester v. Pennsylvania Coal Company*, was inserted by mistake.

THE LUZERNE LEGAL REGISTER.

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FRIDAY, MARCH 27, 1885.

No. 13

Court of Common Pleas of Schuylkill County.

BOROUGH OF SHENANDOAH *v.* MCGUIRE *et al.*

In cases of summary conviction no appeal from the judgment of the justice can be taken, unless allowed specially by the court upon cause shown.

Rule to show cause why appeal should not be entered.

The opinion of the court was delivered June 23, 1884, by

PERSHING, P. J.—On April 28, last, a summons was issued by Justice Shoemaker in pursuance of which the defendants appeared before him on May 3, when a judgment was entered against them for a penalty of twenty five dollars, on proof that they had violated the provisions of an ordinance of the borough of Shenandoah, relating to the public health of said borough. An appeal having been demanded and refused, the defendants, on affidavit filed, obtained the above rule. Was the justice right in refusing the appeal, is the question for us to decide. Two acts of assembly, namely, of April 15, 1835, sec. 7, and April 5, 1859, sec. 7, P. D. 697, pl. 4 and 5, conferred upon the aldermen and justices of the peace of every city, incorporated township, borough, or town the power to hear and determine all actions of debt for penalty for the breach of any ordinance, by-laws, or regulation of such city, township, borough, or town in the same manner, and subject to the same right of appeal, as debts under one hundred dollars; such actions to be instituted in the corporate name of such city, township, or borough. If this is still the law the right of the defendants to the appeal they demanded from the justice is clear. We think, however, that the constitution since adopted has changed the manner in which appeals may be al-

lowed in cases of this kind. Article 5, sec. 14, is as follows: "In all cases of summary conviction in the commonwealth, or of judgment in suit for a penalty before a magistrate, or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appellate court or judge thereof on cause shown." This section, as at first adopted by the convention, provided that "either party shall have the right to appeal to such court of record as may be prescribed by law," and there stopped. Debates, Vol. 6, p. 338. This was afterwards amended by striking out the words, "shall have the right to," and inserting the word "may," and at the end adding the words, "upon allowance of the appellate court or a judge thereof on cause shown." In this form it was finally adopted and became a part of the constitution. Mr. Buckalew, who introduced the amendment, said that he was opposed to the section as it then stood, "because it will empty into the Common Pleas all cases of summary conviction before magistrates throughout the commonwealth. I take it, it will also apply to all convictions in boroughs before the chief burgess, or other principal executive officers, for breach of a borough ordinance; in other words, all the police business of towns and cities of the state will be taken to a higher court, and this will be an enormous mass of business." See Debates, Vol. 7, p. 515. It was the very purpose, therefore, of the convention to take away from the parties in cases of summary conviction, or in suits to recover penalties, the right to appeal from the judgment of the magistrate unless application was made to the proper court, by which an appeal may be granted on cause shown. The act of April 17, 1876, P. D. 2001, pl. 5, is substantially in the language of the constitution, and directs that where an appeal is allowed it shall be upon such terms as to payment of costs and entering bail as the court or judge allowing the appeal may determine. This supplies former enactments, and necessarily throws the question of appeal upon the courts, to the exclusion of the magistrate. It needs no further argument to show that the justice, in refusing the defendants an appeal, correctly interpreted the law applicable to this class of cases.

The rule is discharged.

Court of Common Pleas of Luzerne County.

PARDEE & MARKLE v. JOHN.

Promissory notes—Evidence.

1. Before the act of 1869 (witnesses) a party to commercial paper, negotiated in the ordinary course of business before maturity, was incompetent to testify to anything tending to impeach its validity, before or at the time it passed out of his hands.
2. If the note appeared on its face to have been regularly negotiated before maturity, the contrary could not be proved by the endorser in order to make way for his testimony as to matters of defense existing anterior to, and at the time of, the making or negotiation of the note.
3. In a suit by an endorsee against the maker, a release of the endorser by the maker would not make him a competent witness for the latter to testify to facts invalidating the note, there being no evidence *aliunde* that it was not negotiated before maturity.
4. The act of 1869 does not affect the rule, in a case within the *proviso*, relating to suits by and against executors, etc.
5. The endorser may, notwithstanding the above rule, testify to payment of the note in a suit against the maker.
6. The endorser, in a suit against the maker, testified in general terms that the note was paid "by judgment and property." *Held* to be insufficient.
7. A witness testifying to payment "by judgment and property" must give facts, not conclusions, and if from such facts payment would legally result as a conclusion, the question as to the existence of the facts goes to the jury.

Rule for a new trial.

The opinion of the court was delivered February 16, 1885, by

RICE, P. J.—Before the passage of the act of 1869 it was a settled rule of evidence in this state that a party to commercial paper, negotiated in the ordinary course of business before maturity, was incompetent to testify to anything tending to impeach its validity, before or at the time it passed out of his hands. *Bank v. Rhoads*, 8 Nor. 353. This rule, however, was confined strictly to negotiable instruments, and did not apply even to them unless they had been actually negotiated in the regular course of business, previous to their maturity. *Harding v. Mott*, 8 H. 469. Where evidence invalidating the transfer was given *aliunde* it was held that it would then be competent to prove the other facts by the endorser, but where the note appeared on its face to have been regularly negotiated before maturity, the contrary could not be proved by the endorser in order to make way for his testimony as to matters of defense existing anterior to and at the time of the making or negotiation of the note. *Barton v. Fetherolf*, 3 Wr. 279; *Harding v. Mott*, *supra*; *Griffith v. Reford*, 1

R. 196; *Jarden v. Davis*, 5 Wh. 338; *Klopp v. Leb. Val. Bank*, 3 Wr. 489; *Kirkpatrick v. Muirhead*, 4 H. 128. The ground of exclusion was policy of law. It was said that the rule was based on "the impolicy of permitting one who had assisted to put into circulation a commercial instrument afterwards to aver a taint upon it at the time it passed through his hands." Hence in a suit against the maker, where the rule would otherwise apply, a release would not make the endorser a competent witness to testify to matters of defense existing before and at the time of the making and negotiation of the note. The release cannot have any effect upon his competency, unless we assume the very facts which the witness is not competent to prove, namely, that the paper is not what it purports to be, and was not regularly negotiated as it appears to have been. Notwithstanding the release, the objection to his competency, not being based on interest but policy of law, still remains. The act of 1869 does not affect the applicability of the rule to the defendant's offer under consideration, inasmuch as this case is within the proviso. But, while we held that James Fitzpatrick, the endorser, was not a competent witness to impeach the validity of the note in suit, yet we also held that he could testify as to payment. His testimony upon that subject was, however, clearly insufficient. He says, in general terms, that the note was paid "by judgments and property." This assumed everything, and the witness put himself in the place of both the court and jury. Payment in the way indicated by his answer is a conclusion which involves questions both of fact and law. He should have given the facts, and if from those payment would legally result as a conclusion, the question as to the existence of the facts would have gone to the jury. For aught we know, his conclusion—for that is what his evidence amounts to—may have been based on an entirely erroneous notion of the law; and indeed so far as his cross-examination throws any light upon the matter, it was. We do not think it necessary to cite authorities to show that our answers to the points were the only ones which could have been given.

The rule is discharged.

H. W. Palmer and A. H. Dickson, Esqs., for plaintiffs.

John Lynch and J. V. Darling, Esqs., for defendant.

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FRIDAY, APRIL 3, 1885.

No. 14

Court of Common Pleas of Luzerne County.

REDMER v. MARKLE & CO.

Appeal in action for wages—Costs.

Where a defendant in an action for wages (in Luzerne county) appeals from the judgment of a justice, and on the trial of the case in court a verdict is rendered against him, he is liable for the costs, no matter what the amount of the verdict, unless, when taking the appeal, he filed an affidavit admitting a certain amount to be due, and judgment was entered for said amount by the justice as provided in the act of February 28, 1870, P. L. 269.

Motion to enter judgment against the plaintiff for all costs accruing from the day succeeding the entry of appeal.

The opinion of the court was delivered March 14, 1885, by

RICE, P. J.—This action was brought before an alderman for the recovery of wages of labor. On November 15, 1882, the defendants appealed, and on the same day filed with the alderman the affidavit required by our local act of February 28, 1870, P. L. 269, in which they admitted that they owed the plaintiff "about the sum of ninety-five dollars." The alderman did not enter judgment for the sum thus admitted to be due, but attached the affidavit to his transcript, and both were filed on November 20, 1882. The cause, having been put at issue, was tried in court and resulted in a verdict, on February 10, 1885, in favor of the plaintiff for ninety-eight dollars and thirteen cents. The defendants then made the above motion. Without elaboration we will simply state our conclusions.

I. The right which the defendants may acquire, in a certain event, to have judgment entered on the verdict as above asked for is purely statutory, and depends on a substantial compliance with the provisions of the statute.

II. The case is not within the act of 1870, *supra*, because no judgment appears by the transcript, or in fact, to have been entered by the alderman for the amount admitted to be due, even conceding that the admission was sufficiently certain to authorize judgment for any amount. If the plaintiff had discontinued the further prosecution of the appeal, as provided in section 2, he would have had no judgment to which he could resort for the collection of the amount admitted to be due.

III. The plaintiff was not responsible for the default, if any, of the alderman. If the defendants intended to claim, and expected to receive, the benefits of the act, it was incumbent on them before entering their appeal in court, to see that judgment was entered by the alderman as the act requires.

The motion is refused, and upon payment of the proper fees, judgment is directed to be entered in favor of the plaintiff on the verdict, with costs.

Court of Common Pleas of Luzerne County.

HARRISON v. TILLINGHAST *et. al.*

Pleading—Abatement.

A plea in abatement will not ordinarily be received after a plea in bar, but where a plea in bar has been entered inadvertently and by mistake, and the defendant has not been in default, and applies at once, it is in the discretionary power of the court to permit him to withdraw it and to plead in abatement.

Rule to show cause why the defendant should not be permitted to withdraw plea of not guilty and plead in abatement.

The opinion of the court was delivered March 30, 1885, by

RICE, P. J.—The authorities cited by the plaintiff's counsel, as well as many more which may be cited, show that a plea in bar is a waiver of a former plea in abatement, that after a plea in bar it is too late to plead in abatement, and that a defendant is not entitled *as a matter of right*, under our statutes relating to amendments, to withdraw a plea in bar and substitute a dilatory plea.

Riddle v. Stevens, 2 S. & R. 543; Stoever v. Gloninger, 6 S. & R. 69; Tams v. Hitner, 9 Barr, 447; Hartz v. Com. 1 Gr. 359; Beitler v. Story, 10 Barr, 418; Good Intent Co. v. Hartzell, 10 H. 277. Further, because dilatory pleas are held in such great disfavor, it is held that a party may forfeit his right to plead in abatement by *laches*. For example, he is not entitled, as matter of right, to file such plea after the time allowed for pleading has expired; Hinckley v. Smith, 4 W. 433; Daniels v. Sanderson, 10 H. 443; Ralph v. Brown, 3 W. & S. 398; Witmer v. Schlatter, 15 S. & R. 150; Chamberlain v. Hite, 5 W. 374; and it is positive error to permit him to do so on the trial of the case. Green v. N. Buf. Twp. 6 Sm. 110; Murphy v. The Times, 7 Out. 260. It also seems to be the rule, that if a defendant under terms of pleading issuably puts in a plea in abatement, the plaintiff may treat it as a nullity and sign judgment. But, if we correctly understand the state of the record, it does not appear that any of these conditions, by which a party may lose the right to plead in abatement, existed in this case at the time the present plea was filed. The declaration appears not to have been filed until several terms after the return day, and the defendants were not under rule to plead. (See secs. 4 and 5, rule XXV.) Hence the only question is whether, under such circumstances, this is a proper case for the exercise of the discretionary power of the court to permit a withdrawal of the plea of not guilty, and the substitution of a plea in abatement. Notwithstanding the disfavor in which pleas in abatement are held, the principle is recognized in several of the cases above cited that this may be done "under special circumstances, of which the court will judge." The fact is asserted by affidavit of counsel (and we do not understand it to be seriously denied), that the plea of the general issue was entered "inadvertently and by mistake," that the counsel discovered his mistake on the same day, but that, court not being in session, he could not apply for leave to rectify it on that day, but did apply at the first session thereafter (within two days) and obtained the present rule. While we are not entirely clear upon the question, yet inasmuch as it does not appear that there was any previous laches or default, and as the motion to amend was made at the very first opportunity, we are inclined to the opinion

that, under all the circumstances, it is a proper case for the allowance of the order asked for. On the other hand, the defendants ought to interpose no obstacles in the way of the earliest possible disposition of the plea.

The rule is made absolute.

Court of Common Pleas of Schuylkill County.

GREACEN v. FOSTER.

It is not necessary that a married woman should actually be declared a *feme sole* trader in order to render her liable on her contracts.

Rule for judgment for want of a sufficient affidavit of defense.

The opinion of the court was delivered June 16, 1884, by

PERSHING, P. J.—The declaration sets forth that the defendant, a married woman, doing business in her own name, by a decree of this court made September 6, 1880, availed herself of the provisions of the act of April 3, 1872, by which the separate earnings of any married woman may inure to her separate benefit and use, independently of her husband, and not subject to the claims of his creditors. The only defense set up is that at the time the debt in suit was contracted the defendant was, and still is, a married woman living with her husband, and that she never was declared to be a *feme sole* trader. This is not sufficient. It is not necessary that the defendant should have been declared a *feme sole* trader to make her liable in this action. It is enough that she is carrying on business in her own name, under the protection conferred by the act of 1872. That this renders her liable upon a contract entered into by her in the prosecution of such business, and that she may be sued as though she were a *feme sole* trader without joinder of her husband, was distinctly decided by the Supreme Court in *Bovard v. Kettering*, 12 W. N. 345, s. c. 5 Out. 181. That decision, without referring to others, is conclusive of the present application.

Rule made absolute.

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FRIDAY, APRIL 10, 1885.

NO. 15

Court of Common Pleas of Luzerne County.

McKEAN *et al.* v. BROWN *et al.*

1. The jurisdiction of equity to decree specific performance of contracts, is not confined to contracts relating to real property exclusively.
2. Generally, a preliminary injunction will not be awarded in a doubtful case.

Motion for injunction.

The opinion of the court was delivered February 23, 1882, by

RICE, P. J.—Whether the plaintiffs' remedy at law, for the breach of the defendants' contract, either by personal action against them or by action of replevin for the logs, would be so clear, adequate, and satisfactory as to take away the jurisdiction of a court of equity, is a question not free from difficulty. It must be conceded that the jurisdiction of equity to decree specific performance of contract is not in principle nor practice confined to contracts relating to real property. There may be cases of contract relating to personality with such circumstances as to render a decree for specific performance the only remedy to prevent irreparable injury. Whether this is such a case we need not now decide. After a careful examination of the bill and the affidavits, we conclude that the motion for an injunction must, at present, be refused on other grounds, which we will briefly state: First. The time within which the defendants are to cut and deliver the logs for the present year has not yet expired, and it cannot be said with certainty from what now appears before us, that they will not perform their contract as they have agreed to do. Second. The affidavit of the defendants, as well as that of Mr. Bailor, distinctly and unequivocally deny that they have been, or are, cutting and delivering to any other persons than the plaintiffs the timber on the tracts described in the bill. We have examined these affidavits with great care to discover any equivocation or evasion in them, and have failed. We are bound to accept

them as having been made in good faith, and as an assurance that no damage to the plaintiffs' rights is to be apprehended from a conversion or delivery of the property to any other person pending the determination of the parties' rights under these contracts. As we understand these affidavits, and, giving them the weight to which they are entitled, the right of the plaintiffs to this injunction is at present doubtful. But, we repeat, this conclusion is reached on the faith of the defendants' denial that there is any actual or threatened conversion of the timber embraced in their contracts with the plaintiffs, and being so, it will not embarrass the court in the future in taking such action, or making such decree as the nature of the case may require.

The motion for injunction is denied without prejudice, and the injunction allowed *ex parte* is dissolved.

Court of Common Pleas of Luzerne County.

PITTSTON WATER COMPANY v. BOROUGH OF PITTSTON.

1. It was established that the Pittston Water Company furnished water to the hydrants of the borough, at the instance and request of the latter. *Held*, that the company was entitled to recover, not simply the actual cost of the water drawn by the borough from the hydrants, but a reasonable compensation, which would include the value of the water and the service in furnishing it to the hydrants *ready for use* for the purposes for which it was required.
2. Except where there is the clearest proof of mistake, the stenographer's notes of trial must be regarded as conclusive.
3. Evidence that the water furnished was mixed with sand and other material destructive to the steamer, is relevant inasmuch as it affects the compensation which, in equity and good conscience, the company was entitled to claim.

Rule for new trial.

The opinion of the court was delivered September 18, 1882, by

RICE, P. J.—Of the five reasons for new trial filed, only two were urged upon the argument, and to these we shall confine our attention. The first is, "that the court erred in charging that the measure of damages in this case does not depend on the water used, and the cost of this water to the company, with a reasonable allowance for profits." The exact language of the charge upon this point was as follows: "In arriving at a conclusion of the reasonable compensation which the plaintiff should receive, you are not limited simply to the actual cost of the water drawn by the borough from the hydrants. The reasonable

compensation would be the value of the water and the service in furnishing it to the hydrant ready for use for the purposes for which it was required." The able argument of defendant's counsel has failed to convince us that this statement of the measure of damages was either vague or incorrect. The error, as it seems to us, which inhered in the point submitted and in the argument, is in assuming that the right of the plaintiff to recover rested on an implied *assumpsit* arising from the use of the water by drawing it from the hydrants simply. This is a mistake. We expressly charged the jury that "in the case of a borough the law would not imply an agreement to pay from the fact alone that she has used the water." And in another portion of the charge the jury were specially instructed that in order for the plaintiff to recover at all, "it must be established that the water was furnished by the company to the hydrants of the borough at the instance and request of the latter." It must be conceded then that this fact is found by the verdict, and thus as we conceive, furnishes the true standard by which the compensation should be measured. With this fact found, it would be clearly inconsistent and illogical to limit the plaintiff's recovery to the value of the water actually drawn from the hydrants. If there was any legal obligation resting on the borough to pay, it arose from the fact that they caused the company to furnish to their hydrants an adequate and constant supply of water for the purposes required, and for this they were bound to pay a reasonable compensation, or were not bound to pay at all. As a further reason for a new trial it is urged that the court rejected testimony of the effect of the water upon the steamer. The stenographer's notes upon this point read as follows: "'I call your attention to the water that comes from some of these plugs. What is its character and what effect has it upon the steamer?' Objected to. Defendant's counsel: 'It is for the purpose of showing that this water was mixed with sand and other material destructive to the steamer, which should be permitted to be set off in this suit.' The court: 'I hardly think that would be evidence.'" The foregoing is all that the record, as it now stands, contains in relation the subject. While it might be argued that the record does not show a positive and definite rejection of the offer, yet the language of the court might fairly be given that construction, if there were noth-

ing further than what appears upon the record in explanation. At the time we understood, and so entered the fact on our brief notes, that the offer was withdrawn, and our recollection upon the subject, although not positive, is that the withdrawal of the offer was accompanied by the statement of counsel that it might be renewed at some subsequent stage of the trial. On the other hand, the affidavit of defendant's counsel asserts that the offer was disallowed, that he subsequently renewed it in a slightly changed form, and requested a bill to be sealed at the time. As to the renewal of the offer we have no recollection whatever, neither do our own notes, nor the notes of the stenographer, show anything upon the subject. To the judge trying the case this presents a question of extreme delicacy, but after a full consideration of the matter, and of the effect of our ruling as a precedent, we conclude it to be the duty of the court in such a conflict, and the only safe rule to follow, except where there is the clearest proof of mistake, to treat the notes of the stenographer as containing the full statement of what occurred at the time. We assume from the affidavit of the defendant's counsel, and his undoubted integrity, that he must certainly have understood the court as definitely rejecting his offer, and as we have said, the remark of the court as it stands upon the record without explanation, might fairly be given that construction. We do not think, as is argued, that it was competent to offset against the plaintiff's demand the alleged consequential damage to the steamer, for the reason that under the evidence such damages, if any, did not arise *ex contractu*, neither did it appear that the ownership of the steamer was in the borough so as to give the latter a right of action, of recoupment, or of set-off, for damages thereto. But, on careful consideration it will be seen, although the purpose of the offer was hastily worded, that the evidence tended to show, not merely damages to the steamer as an offset, but a failure of the plaintiff company to furnish water suitable for the purposes for which it was required, as evidenced by the injury to the steamer. For this purpose we think the question was competent, inasmuch as it affected the compensation which, in equity and good conscience, the company was entitled to claim. *Heck v. Shener*, 4 S. & R. 249; *Wright v. Cumpsty*, 5 Wr. 102.

The rule for new trial is made absolute.

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FRIDAY, APRIL 17, 1885.

No. 16

Court of Common Pleas of Luzerne County.

TERRY v. KNOLL.

Attachment under act of 1869.

1. Where the defendant's affidavit is positive in its denial of the allegations of fraud contained in the plaintiff's affidavit, the burden of proof is cast on the plaintiff.
2. Silence is in itself an important fact when a defendant has the opportunity and declines to speak in explanation of other relevant facts peculiarly within his knowledge.
3. A fraudulent concealment of *money* is within the provisions of the act of 1869.
4. An assignment and disposition of property intended to be effected for the purpose of defeating creditors by means of a sheriff's sale upon a fraudulent and collusive judgment, are within the meaning of the act.

Rule to show cause why attachment issued under act of March 17, 1869, shall not be dissolved.

The opinion of the court was delivered June 19, 1882, by

RICE, P. J.—We take up this case first in order that the defendant may have the benefit of the testimony taken on his behalf. But, as many of the questions of fact involved here may possibly arise again on distribution, we do not purpose at this time to discuss them at length. Manifestly, it would serve no good purpose to do so, and indeed, to do so might embarrass the issue which may hereafter arise between the different claimants of the fund. We have, nevertheless, carefully examined and considered the testimony submitted upon both sides of the present issue, and have endeavored, so far as possible, in such consideration to free our mind of impressions received and convictions formed on a former hearing, and we are satisfied that this attachment, as well as those issued by other creditors, must be sustained. The

plaintiff's affidavit alleges a fraudulent concealment of money and property, and also a contemplated fraudulent assignment and disposition of property.

I. If, as is claimed, the defendant borrowed of Paul Suchorski \$2,200, and of his brother, S. P. Knoll, \$3,600, in the year 1880, and of the latter \$1,200 in addition in the year 1881, one of two conclusions would seem to be inevitable from a careful examination and analysis of the testimony; either that the defendant did not put it into his business, or if he did, that there is a concealment of money or property which ought to go to satisfy his present debts. The defendant claims that this money went into his business. But it cannot be traced in his bank account; nor in losses suffered; nor in outstanding accounts; nor in outside investments or personal expenses; nor in the goods or other assets of the defendant at the time he was closed up. The theory that it was used in the business prior to August, 1881, is not consistent with the great weight of the testimony, and the defendant's own declarations as to the size and value of his stock; but if it was used in the purchase of goods and payment of expenses prior to August, 1881, what became of the legitimate income and profits of the business up to that time? This inquiry is natural and pertinent, for the reason that the outstanding accounts due to the defendant were trifling in amount, and, by his own declarations, made at different times, he was doing well and had had no losses. These are matters which require explanation in order to rebut the natural inference which we stated at the outset, and if they are susceptible of such explanation, it was peculiarly within the power of the defendant to furnish it. It is true that in these proceedings, where the defendant's affidavit upon which the rule to dissolve is granted is positive in its denial of the allegations of fraud contained in the plaintiff's affidavit, it has always been held in this court that the burden of proof is cast on the plaintiff, and we do not purpose to overlook or depart from that rule in this case. The defendant, having by his affidavit cast the burden on the plaintiff, could keep silent and leave the latter to make out his case as best he could. But silence is itself a fact, and becomes an important fact when a man has the opportunity and cannot, or will not, speak in explanation of other relevant

facts peculiarly within his knowledge. In such case he cannot complain if every legitimate inference which the facts, including the fact of his unwillingness or inability to furnish such required explanation, will warrant is taken against him. But it may be said that if the testimony of the defendant to the effect that this money went into his business be rejected as inconsistent with all the other evidence in the cause, then the inference of a fraudulent concealment cannot be drawn. This conclusion does not follow, for in that case the large amount of money which he and his brother and Paul Suchorski swear that he borrowed and received would remain absolutely unaccounted for, except by the untruthful allegation that it was put in the business, and it must not be forgotten that a fraudulent concealment of *money* is within the express provision of the statute. Of course if the testimony as to loan of the money be entirely rejected, then the allegation of fraudulent concealment would fail for want of proof. But, without elaborating further, we proceed to the second branch of the case.

II. As to the second branch of the case, namely, the fraudulent assignment and disposition of the defendant's property, it is to be noted at the outset that the truth of the allegation is based on the proof as to the want of consideration for, and fraudulent character of, the judgments in favor of Paul Suchorski and S. P. Knoll, the defendant's brother. But it is beyond doubt or question that an assignment and disposition of property intended to be effected, for the purpose of defeating creditors, by means of a sheriff's sale upon a fraudulent and collusive judgment, is within the meaning of the act.

It is quite clear from the testimony that the suggestion to confess these judgments for the purpose of having a sale thereon, came from the defendant. But if the testimony of S. P. Knoll and Paul Suchorski be believed, then, undoubtedly, they were not without consideration, and a mere preference by such means would not be fraudulent *per se* as to other creditors. It is to be remembered, nevertheless, that the present issue is not between Paul Suchorski and S. P. Knoll on the one side, and the plaintiff on the other, but between the latter and Max. Knoll, and therefore all the acts and declarations of the latter, and the general

conduct and character of his business are competent to rebut his present allegations that this money was borrowed and received by him, that he put it into the business, and that he has not concealed it from his creditors. There are several considerations which lead us to the conclusion that these judgments were not given in good faith to secure valid existing debts, but were given fraudulently, and with the intent, by means of a sheriff's sale to be had thereon, to defeat this plaintiff and other creditors. Among these considerations are: (a) The improbability of the testimony of S. P. Knoll and Suchorski as to the circumstances of the alleged loan, by which they gave to this defendant their accumulated earnings of many years of industry and economy, amounting to seven thousand dollars, the defendant being a resident of a different state, and giving no security, and not having property or business sufficient to make it morally probable that the loan would be repaid. (b) The almost utter inability or unwillingness of the defendant to explain the times and circumstances when and under which the different amounts were received by him. (c) The fact, as we have already stated, that the money cannot be traced in his bank account; nor in losses suffered; nor in outstanding accounts; nor in outside investments or personal expenses; nor in the goods or other assets of the defendant at the time he was closed up; nor in the business as it was conducted prior to the sudden increase in the purchases about August 1, 1881. (d) The facts that the purchases within about ninety days of the sheriff's sale amounted to nearly, if not quite ten thousand dollars; that these purchases were not required by his business; that the stock was not well proportioned, and as one of the witnesses testifies, seemed to have been bought for the purpose of being sold in bulk; that these purchases, for most of which he owed, constituted nearly the entire stock at the time he confessed these judgments. (e) The fact that, from the outset, the defendant represented to different persons that the capital of one thousand two hundred dollars, with which he started in February, 1880, was his own money, and that he owed no debts. So late as August 2, 1881, he told Mr. Sumner that he owed very little, as he bought on short time, that he was doing well and was worth between four and five thousand dollars; and

in October, 1881, within four days of the time when the judgments were confessed, he told Oliver P. Terry that he owed no debts that were due, and that he would pay their bill about November 1. We have endeavored to reconcile these declarations made to Mr. Masters, to the two Terrys, and to Mr. Sumner as to his capital and indebtedness with the defendant's present claim, but have been unable to do so. It will be observed that the defendant did not testify on this rule. We have, however, in two or three instances referred to his testimony given upon the hearing in November last. We have done so in pursuance of the agreement of counsel on the argument that the testimony then taken might be considered here.

The rule is discharged.

John Lynch, Esq., for rule.

W. S. McLean, Q. A. Gates, L. H. Bennett, S. J. Strauss, and J. T. Lenahan, Esqs., *contra*.

Supreme Court of Pennsylvania.

HIBBS v. WOODWARD.

Plaintiff testified that defendant promised to pay the printing for the democratic committee; another witness partly corroborated that; defendant testified that he had no recollection of such a contract. *Held*, that the evidence was sufficient with plaintiff's book entries to establish his claim.

Error to the Court of Common Pleas of Luzerne county.

The opinion of the court was delivered May 19, 1884, by

GORDON, J.—The findings of a referee are to be taken as *prima facie* correct, and are not to be overturned, except for some obvious mistake or unwarranted conclusion. In the case before us, we discover in the report of the referee neither of these defects, and think, therefore, it ought to have been approved by the court below. The evidence of the plaintiff as to the assumption of the defendant, bears nothing upon its face calculated to render it doubtful, and as it was corroborated, not only by his book entries

made at the time the work was done, but also by the testimony of George N. Reichard, it ought to be taken for verity. This last named witness avers that when the plaintiff was consulted as to the required printing, he refused to do it unless some one would agree to become responsible for its payment. He says further: "My impression is that some one authorized us to have the printing done, and that it was to be paid for out of the fund of the democratic county committee; there is no question about it; I am certain, and if Mr. Woodward was the chairman that year (1865) he must certainly have authorized us to have printing done." Now, as it is not disputed but that Mr. Woodward was the chairman of that committee for that year, we must agree with the referee that this is a substantial corroboration of the plaintiff's evidence. If the plaintiff refused to do the printing except on the responsibility of some individual person, and in view of that fact the work was ordered by the defendant, he would be primarily liable, and he, not the plaintiff, must look to the committee for reimbursement. Nor does the testimony of the defendant seriously contradict that of the plaintiff. He did not attempt positively to negative what the defendant had sworn to, but only alleged that he did not have any recollection of such a contract. We cannot, however, agree to give his want of memory a weight equal to that of his adversary's positive allegation, and this the rather when the latter is approved by the referee. The receipts purporting to be in full of all demands, cannot be made effective to defeat the plaintiff's claim for two reasons: 1st. They are appended to special bills which form no part of the claim now in suit. 2d. Adams, who signed them, had no power to receipt for any but such bills as were put into his hands for collection. Finally, we are of opinion that the defendant's agreement to pay for the printing charged to him by the plaintiff, amounted to an original undertaking, and was not merely an assumption to pay the debt of another party.

The judgment of the court below is reversed, and it is ordered that judgment be entered on the award of the referee, with interest and costs.

Q. A. Gates, Esq., for plaintiff in error.

H. W. Palmer, Esq., for defendant in error.

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VOL. XIV.

FRIDAY, APRIL 24, 1885.

No. 17

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Court of Common Pleas of Luzerne County.

SMITH v. SMITH.

1. A *capias* issued against a married woman may be amended by the addition of the name of her husband.
2. Her privilege from arrest is not ground for quashing the writ.
3. If the affidavit upon which a *capias* in slander issues is insufficient, the proper practice is to discharge the defendant without bail, but not to quash the writ.

Rule to show cause why the writ of *capias* in this case shall not be quashed at costs of plaintiff, and suit dismissed.

The opinion of the court was delivered December 8, 1884, by RICE, P. J.—The reasons assigned for this rule are: First. That the defendant is a married woman. Second. That the affidavit upon which the writ issued sets forth no cause of action.

I. To meet the first objection the plaintiff moves to amend by adding the name of the defendant's husband as a co-defendant. This amendment is allowable under section 2 of the act of May 4, 1862, P. L. 574. and being made the record stands, so far as this motion is concerned, as if the writ had originally been issued against the husband and wife, and she alone had been arrested. It is conceded that a *capias ad respondendum* may issue against the husband and wife for the wife's tort, but it is argued that her arrest upon the writ was illegal. Admit this to be so, *her* privilege from arrest is not ground for quashing the writ, and the irregularity in issuing it against her alone has been cured by the amendment. She might have been entitled to discharge from imprisonment on *habeas corpus*, and may still be entitled to be discharged

on common bail, but is not entitled to have the writ quashed. (See *Hurst v. Smith*, 9 W. N. 461; *Com. ex rel. v. Keeper*, 9 W. N. 314; *Com. ex rel. v. Keeper*, 11 W. N. 341; *Waters v. Drayton*, 2 Kulp, 52.)

II. It is too clear for argument that the words alleged in the affidavit are not actionable *per se*. "For, in order to render words spoken of a private person actionable, they must impute, not only an indictable offense, but one of an infamous character, or subject to an infamous or disgraceful punishment." *Stitzell v. Reynolds*, 17 Sm. 54. The words laid in the affidavit charge no offense whatever, and it is very difficult to see how they could produce any injurious consequences for which the plaintiff could recover under an averment of special damages. But certainly without such averment and proof the plaintiff could not recover, and without such averment appearing in the affidavit, the defendant cannot be held to bail.

But we doubt the propriety of quashing the writ and dismissing the suit because the affidavit to hold to bail, though regularly filed, does not show that the words are actionable *per se*. The reason of inquiring into the cause of action on writs issuing against the person is to prevent a vexatious plaintiff from imprisoning the body of the defendant without cause. *Vienne v. McCarty*, 1 Dall. 165. This inquiry is usually made by a rule on the plaintiff to show his cause of action. If, upon the hearing, the affidavit produced and read by the plaintiff does not show a cause of action for which the defendant should be held to substantial bail, the court discharged him on common bail, or if the bail demanded is excessive they reduce it. *McCawley v. Smith*, 4 Y. 193; *Scott v. Crum*, 1 Pears. 196; *Pfoutz v. Corley* (MSS.) This is as far as it is necessary to go in order to protect the personal liberty of the citizen. It is this power of inquiring into the cause of action in cases where the personal liberty of the defendant is involved which authorizes the court to prescribe by standing rule that "no bail shall be required in actions for libel, slanderous words, malicious prosecution, conspiracy, or false imprisonment unless an affidavit of cause of action be made and filed before the issuing of the writ." The affidavit is a proper condition precedent to a demand for bail, and if insufficient we

may discharge the defendant without bail, but it is not a condition precedent to the issuing of the writ, for that has a higher sanction in the act of assembly, and hence we conclude the insufficiency of the affidavit is not ground for quashing the writ and thus summarily turning the plaintiff out of court. Having, by the discharge of the defendant on common bail, placed the case on the same footing as an action commenced by summons, we think reason and the general practice require us to permit the case to take the ordinary course, and to leave the question of the plaintiff's right to maintain his action to be determined by the pleadings and proofs as in other cases.

The motion to quash the writ and dismiss the suit is denied; it is at the same time ordered that the defendant be discharged on common bail.

Michael Cannon, Esq., for plaintiff.

George W. Shonk, Esq., *contra*.

Joseph David Coons was born in Wilkes-Barre, Pa., June 14, 1852. He was educated at the Wilkes-Barre Academy and at the Central High School in Philadelphia, from which he graduated in 1870 in the same class with Robert E. Pattison, governor of Pennsylvania. After graduation he spent a year in the counting-house of a large manufacturing establishment to fit himself more thoroughly for his profession. He then came to Wilkes-Barre and entered the office of Stanley Woodward as a student at law. He was admitted to the Luzerne bar September 14, 1874. After his admission he went into partnership with Mr. Woodward, which continued until the latter was elevated to the bench. For a number of years Mr. Coons has been the solicitor of the Wilkes-Barre Home for Friendless Children, and also one of the trustees. The father of the subject of our sketch was David Coons, a native of Giebelstadt, Bavaria, Germany. He emigrated to America in 1840, located in Wilkes-Barre, and was one of the early Jewish settlers of this city. He was in business until 1861, when he removed to Philadelphia, and there died in 1875. His brother, Captain Joseph Coons, a resident of this city,

preceded him to this country and also located in Wilkes-Barre. The mother of J. D. Coons is Helena Long, a daughter of the late Isaac Long, of Pretzfelt, Germany. She is the sister of Marx Long and Simon Long, and of Mrs. John Constine, and cousin of Isaac Long and the late Jonas Long, of Wilkes-Barre. She was a native of Pretzfelt, in the kingdom of Bavaria, and was the sister of the late Martin Long, who is believed to have been the first Jewish merchant of this city. In an article written in 1883 by C. Ben Johnson for the *Democratic Wæchter* on the Germans of Luzerne connty, he speaks as follows of the Coons and Long families:

"Martin Long soon entered into business and quickly became a leading citizen. He was at one time first lieutenant of the Wyoming Artillerists, and died only a few years ago, not yet, by any means, a very old man. Marx Long, his brother, is still in business on the square, on the same spot where the two first opened forty-one years ago. He has been a worthy citizen in every respect. He was many years an active fireman, has been a trustee of the Home for the Friendless, and in connection with the humane efforts in behalf of the employment and care of the poor taken from time to time has always performed a foremost part. The Longs, Jonas and Isaac, who are brothers, and Simon, who is a brother to Marx, have been among the most successful of our merchants, and owe that success to habits which would win it even amid much less auspicious opportunities than have attended them here. They are public spirited citizens as well, ever ready to aid by their counsel and means, all proper schemes for the improvement of the city and advancement of its people. Jonas is now in the city council.

"Captain Joseph Coons is known to every Wilkes-Barrean, and always had a penchant for matters military. He was active in the formation of the old Wyoming Jaegers, and remained with them until their disbandment. He is still a hearty man and works every day in his store as vigorously as any of his sons. The Wyoming Jaegers was one of the earliest, and for many years most prominent, of German organizations in Wilkes-Barre. It came into being in 1843, and at the first meeting John Reichard was chosen captain. There were less than a score enrolled at that meeting, but recruits came in quite rapidly, and in a few years the roll included from forty to forty-five names. Some of these men are still living and those who are gone are well and kindly remembered. Of those living Captain Coons was among the closest and most enthusiastic adherents of the organization.

At the first meeting he was made second corporal, and he went from that humble position on up, through the regular gradations, until he became captain, which office he held acceptably for many years. Many of the Jaegers served in the Mexican war in Captain E. L. Dana's company, which was made up about half and half of Jaegers and old Wyoming Artillerists. Jacob Waelder was the first lieutenant. This organization participated in all the principal engagements of that war, comporting themselves gallantly upon every occasion. Several were killed (among them private John Hahn, whose wife is still living in Wilkes-Barre), and a number were more or less seriously wounded. In 1861, when President Lincoln's call for seventy-five thousand three months volunteers was emitted, the Jaegers were among the first to respond. In a few days the company was on its way to Harrisburg, eighty-five strong, under command of Captain Coons. Arriving there the captain was compelled on account of ill-health to resign, and George N. Reichard was chosen captain, John Treffeisen, who now resides in Pittston, first lieutenant, and Gustav Hahn second lieutenant. The company served its three months and was honorably discharged."

Mr. Coons, as will be seen, is a scion of one of the first of the Jewish families to locate in this part of Pennsylvania, where that people have made themselves conspicuously useful in every profession and walk of life. In each locality throughout this broad land, and in almost every nation on earth, as is well-known, Hebrews have distinguished themselves in law and state craft, as well as in commerce and the arts. Tens of thousands of the faith have left the impress of their industry, enterprise, and genius upon the cities and towns of their residence in the United States; and tens of thousands are still contributing to our progress and glory. Mr. Coons is a not unworthy representative of this energetic, talented, and useful people. Though yet a young man he has achieved an enviable standing at our bar, and a practice which should net him a very respectable income. He has sat at the feet of his elders in the profession and imbibed of the lessons of their experience to good purpose, so that he finds himself to-day formidably equipped to bring order out of the tangle of law and litigation to the mutual profit of himself and those who have his services. He is a democrat in politics, and can always be depended upon for such service as every good citizen should render to the party of his choice, but has as yet

evinced no ambition for political honors, though his name has been not infrequently suggested as that of one in every way worthy thereof. He is a lover of good literature, is always well informed on all topics of general interest, is socially a good fellow, and as yet a bachelor.

Patrick Henry Campbell was born in Scranton, Pa., November 24, 1845. Thomas Campbell, the father of Mr. Campbell, was born near the city of Edinburg, Scotland, and emigrated to this country at the age of sixteen, landing in Boston. He came immediately to Pennsylvania, which was about the time the North Branch Canal was in process of construction, and obtained employment on the same as a foreman, which position he retained until the completion of the work. He removed to Scranton about 1840, and was in the employment of the Scrantons until November, 1847, when he purchased a farm in Covington township, Luzerne (now Lackawanna) county, and where he continued to reside until his death in 1875. He married, in 1844, Julia Banning, a native of the parish of Cullen, in the county of Louth, Ireland, who remembers as a child her father returning from the battle of Waterloo wounded. Like her husband, she came to this country when quite young. The father of Thomas Campbell was Michael Campbell, a brewer in the town of Ardee, near Dublin, Ireland. He resided for a time near the city of Edinburg, leaving his business in Ireland in charge of his oldest son, who, joining his regiment in the Peninsula, necessitated the father's return to Ireland to continue his business. The son fought through the Peninsular wars, and rose to the rank of lieutenant in the Royal Artillery, and was killed in the Sepoy campaign in India. P. H. Campbell worked on his father's farm in the summer months and attended school in winter until July, 1862, when, with others of his neighbors' sons, he enlisted in Company F, one hundred and seventh regiment Pennsylvania Volunteers, for three years. At the expiration of his term of service he re-enlisted for another term of three years, and served until July 1, 1865, when he was mustered out of service, being

promoted in the meantime to sergeant. He participated in the battles of Cedar Mountain, Rapahannock Station, Second Bull Run, South Mountain, Antietam, Fredericksburg, Chancellorsville, Gettysburg, Mine Run, The Wilderness, Spottsylvania Court House, Petersburg, and Weldon Railroad. At Gettysburg he was wounded, and at Weldon Railroad, on August 19, 1864, was captured with fourteen of his company, and kept in several different prisons in the South—Libby, Salisbury, and Andersonville among the number. Colonel T. F. McCoy, who commanded the regiment to which Mr. Campbell belonged, says of him, "As the colonel and commanding officer of the regiment in which he served, it affords me pleasure to say that he stood high with his comrades as a brave and faithful soldier, and it has been said of him by a gallant officer of the regiment, that he was never known to shirk any duty, either in the camp, on the march, or on the battle-field. It was his good fortune to participate in all the battles with his regiment and company until the battle of the 19th day of August, 1864, at the Weldon Railroad, near Petersburg, Va., when he was made prisoner." In August following his discharge from the army he entered Wyoming Seminary, where he remained until 1869, with the exception of one year when he was a teacher in the Washington Grammar School in this city. He was one of the first teachers in that building. From 1870 to 1873 he was superintendent of the schools of the Second school district in the city of Wilkes-Barre. Mr. Campbell read law with D. L. Rhone, and was admitted to the Luzerne bar September 14, 1874. For four years he held the responsible position of examiner in the Orphans' Court of this county, and now occupies the position of one of the "seven years auditors." Mr. Campbell is a democrat in politics, and in 1884 was a delegate to the state democratic convention. He married, December 14, 1874, Frances McDonald, a daughter of the late Patrick McDonald, of Union township, in this county. Mr. and Mrs. Campbell have four children living, Thomas Edgar Campbell, Stanley Campbell, John Campbell, and Francis Campbell. D. L. O'Neill and Michael Cannon, of the Luzerne bar, are brothers-in-law of Mr. Campbell. Of the numerous representatives of the Irish-American element in our midst who have become

members of the legal profession, none of his age have a better standing, or deserve a better one, than Mr. Campbell. His demeanor is unusually unobtrusive. His quiet manners are, in fact, the first of his traits to attract the attention of an observer. But beneath his calm exterior, and behind his easy-going habits, are a fund of legal and general information, and a wit to put it to good use, that can only be appreciated by those who have had occasion to call them into service. With much attendant bustle and apparent activity many of his contemporaries do but half the business. Mr. Campbell was an exemplary soldier with, perhaps, no special affection for the bearing of arms, but endowed with a high appreciation of a soldier's duty and a courage to perform it, no matter what the risks or the severity of the labor involved. Being possessed of a robust constitution, his captivity by the confederates, though it brought him many privations and much suffering, left no impress upon his health. Though not given to loud political professions he may be depended upon for any reasonable service asked in the name of his party. He has been frequently spoken of by his friends and brother professionals as a probable candidate for district attorney, but has never been formally brought forward for that honor, though he would undoubtedly wear it and discharge the accompanying duties with credit. As soldier, lawyer, and citizen his record is one of which his friends are excusably proud.

George Henry Troutman was born in Philadelphia, January 18, 1842. His paternal great-grandfather, John George Trautman, came to this country from Vienna, Austria, September 16, 1736, in the ship *Princess* from Rotterdam, last from Cowes. He was a German baron. His sister married Marshal Siroc, of France. His grandfather, George C. Troutman, was a native of Reading, Pa. His father was J. Hamilton Troutman, a native of Philadelphia, who was at the time of his death, in 1865, a member of the firm of Kay & Brothers, law booksellers and publishers. The widow of J. Hamilton Troutman, and the mother of the subject of our sketch, is Elizabeth Esler, who now resides

at Washington, D. C. She is a native of Philadelphia, and was the daughter of Benjamin Esler, a native of county Antrim, Ireland. George H. Troutman was educated in the public schools of Philadelphia and the University of Pennsylvania, graduating from the latter institution in 1862. On April 22, 1861, he enlisted as a private in the first regiment Commonwealth (Pennsylvania) Artillery, and served for three months. In 1862 he enlisted for three years in the fifteenth cavalry regiment one hundred and sixtieth regiment Pennsylvania Volunteers. In the campaign of Stone river he was wounded, and in June, 1862, he was taken prisoner at Huntsville, Ala., remaining as such for six months. After his release he was in the quartermaster's department under General G. S. Dodge. He remained in the service until March 1866, when he returned to Philadelphia. Mr. Troutman read law with Edward Hopper, of the Philadelphia bar, and was admitted to practice March 20, 1862. In 1868 he removed to Mahanoy City, Schuylkill county, Pa., and practiced in the courts of that county until April, 1879, when he removed to Hazleton in this county, where he has since resided. He was admitted to the Luzerne county bar September 16, 1874. Mr. Troutman is an exceptionally good public speaker, and being an enthusiastic republican, is frequently summoned by the management of that party to service on the stump in political campaigns. In such capacity he acquits himself with great credit, being powerful in invective and quick to appreciate and take advantage of the temper of the crowd he is addressing. He is an equally good talker before a jury, and capable of symmetrical and incisive argument or appeal. He served in the army with all proper courage and devotion to duty. His first practice as a lawyer was in the neighboring county of Schuylkill, at whose bar he quickly reached a conspicuous place. Seeing, however, what he deemed a better opening, he removed to Hazleton, and in a comparatively few years has succeeded in putting himself in the forefront of the profession there. He is retained on one side or the other in a very large proportion of the causes, both civil and criminal, that come from that vicinity to the county seat for adjudication, and never fails in close application to, and energy in the performance of, the duty for which he has been retained. Mr. Troutman has never

held any public office, but he has been active in county conventions and committees, and if his ambition shall lie in that direction, is likely to be some day the candidate of his party for district attorney of the county. Personally, Mr. Troutman is a favorite with those who know him, being good-natured, a pleasant conversationalist, and otherwise "good company."

Lewis Bartz Landmesser was born in Hanover township, now the borough of Ashley, Luzerne county, Pa., March 5, 1850. He was educated at the Wilkes-Barre Institute, Hopkin's Grammar School, New Haven, Conn., and at Yale College, graduating from the latter institution in the class of 1871. He is the son of Lewis Landmesser, of this city, who emigrated in 1836 in company with his father, John Nicholas Landmesser, from Spiesen, Prussia, of which place he is a native, settling in what is now the borough of Ashley. Lewis Landmesser, sen., is, and has been for many years, a prominent citizen of his adopted country, and has filled many positions of public trust—amongst others that of postmaster at Hendricksburg, and as member of the town council of the city of Wilkes-Barre. In 1877 he was the republican candidate for sheriff of Luzerne county, but was defeated by Patrick J. Kinney, labor reformer, the vote standing: Landmesser, 5,838; M. W. Brittain, democrat, 5,341; Kinney, 14,393; and J. R. Colvin, prohibitionist, 340. The mother of the subject of our sketch was Margaret Greenley, daughter of William Greenley, who was a native of Yorkshire, England. Mr. Landmesser after graduation spent a year in Germany and attended lectures at the university at Heidelberg and the university at Berlin, dividing the time equally between them. He then returned to Wilkes-Barre and entered the law office of L. D. Shoemaker as a student at law. He subsequently read law with H. B. Payne and Stanley Woodward, and was admitted to the Luzerne county bar April 5, 1875. Mr. Landmesser is a republican in politics, and has been a member of the county committee of that party, serving as its secretary for two years in succession. Mr. Landmesser married, February 9, 1876, Caroline Fewsmith, daughter

of Rev. Joseph Fewsmith, D. D., of Newark, N. J. Joseph Fewsmith Landmesser is their only surviving child. He again married, December 10, 1879, Millicent Worrall, daughter of George Worrall, of Elmira, N. Y. Mr. Worrall is a native of Wilkes-Barre. By his second marriage Mr. Landmesser has two children, Bessie Irene Landmesser and Ralph Worrall Landmesser. Mr. Landmesser was fortunate in having a father who was among the earliest, most enterprising, and most successful of the German settlers of the valley; one who by continuous and well directed effort soon managed to place himself among the most prosperous and conspicuous citizens. This gave the son opportunity to acquire an excellent education for the direction and development of such natural talents as he should be found to possess. No expense was spared in this connection, and as a consequence Mr. Landmesser came to the study of the law far better prepared than most young men to master its intricacies. He is a good practitioner, preferring, however, what is called office practice to pleading in the open court. He is one of the examiners of the Orphans' Court, and in that capacity does much useful and reasonably profitable work, requiring no little research and care in the preparation of the cases submitted to him. As already stated Mr. Landmesser is a republican in politics and, though not much given to public speaking, has done committee work with such skill and acceptance as to win the hearty plaudits of his co-partizans. He is young, ambitious, has influential friends, and his future should be rich with the fruits of professional success.

Seligman Joseph Strauss was born in Wilkes-Barre, Pa., August 19, 1852. He was educated in the public schools of Wilkes-Barre, at the academy of the late E. B. Harvey, in the public schools of New York, and the college of the city of New York, graduating from the latter institution in the class of 1872, receiving the degrees of A. B. and B. S., having passed, in addition to the regular classical course, an examination in French, Spanish, and German. Three years later he received the degree of A. M., his thesis being "The Writ of *Habeas Corpus*, its History and

Nature." His father, Abraham Strauss, was born in the village of Kirchschonbach, Bavaria, April 21, 1824. During his school days, though long before the liberal legislation known under the general name "Jewish Emancipation," the Bavarian laws pressed less heavily upon the Jews than those of other German states. While in many respects they were still severely restrictive, some scope was given for acquiring a popular education, and for advancement in various fields of usefulness. Thus it was that he received an average common school training and in addition to it was familiarized with the elements of music and became a fair amateur violinist. It was, however, a period and a country of practical education as well. No vocation in the ordinary paths of life was more respected or sought after than that of a master in one of the many necessary and useful trades; whether the boy chose to become a machinist or a weaver, a blacksmith, a shoemaker, or a tailor there was before him a career of modest and (if thrifty) comfortable usefulness and of general respect. Nor was it left to the mere caprice who should arrive at that station. The guilds, which during the middle ages had wielded so great an influence, though they themselves had lost much prestige, had produced such a system of far-reaching and beneficent legislation, that honor and success as an artizan was only the result of industry and efficiency. The apprentice, the journeyman, the master—each degree was protected and regulated by the law of the land. Therefore, when at thirteen years of age, the moderate means and large family of his parents necessitated this more practical education, he was bound as an apprentice to the tailor's trade, in which capacity he served until May 29, 1839, when he received a certificate of proficiency usually awarded only after three full years of service. It was by him regarded as a great triumph, when at this early age, by reason of his diligence and skill, the strict rules requiring a three year's apprenticeship were in his case suspended, and when he, as a reward of merit, thus prematurely became a journeyman by virtue of a certificate granted by the Royal Circuit Court at Gerolshofen, in the kingdom of Bavaria, inscribed in an official "Journey Book," "or Wander Book," which is still preserved by his family. This certificate states "that the bearer, who has not yet done military duty,

receives permission to journey in the states of the German Confederation for a period of three years." Other states, however, are requested, if he is found outside his journey limits, to take this book from him and supply him with a passport direct to his home. He has been instructed in the duties of a journeyman and begins his "wandering (Wanderschaft) next Saturday, the 2nd of June, on which day he goes to Wurzburg." The title page of this "Wander Book" is as follows: "Wander Book issued under the Supreme Regulations passed the 20th day of November, 1809 (containing forty numbered pages), for Abraham Strauss, journeyman tailor, born in Kirchschoenbach in the year 1824." Then follows a description of his stature, face, nose, hair, eyes, distinguishing marks, and his signature. All this was in accordance with the very strict laws whereby trades, each of which had at that time its guild in Germany, were supposed to be protected and encouraged. If any journeyman during the period of his statutory wanderings violated any of the guild or journey laws, or if he had worked but little at his trade and had spent "the greater part of his time in mere roving," as is stated in the rules on the third and fourth pages of the book before us, when he sought admission to the rank of a master in his vocation, he was subordinated to those journeymen "who had wandered as it was prescribed to them." In each incorporated town where he sought employment, or through which he necessarily passed, he had to submit this book to the local court, or to the burgomaster, for inspection or "visa," and a record of the act attested by the official seal was invariably inscribed before he left the town. In case he had actually found work there, the officer set forth since what date and with what credit to himself he had tarried. At the end of the whole period, upon official examination of the book, it was required that none of its pages should be missing, that it should show no signs of erasures or corrections, and that all the entries of "visa" should, with the employers' certificates, form an unbroken history. On June 2, 1839, then commissioned and protected by this book, weak in body and suffering from a congenital lameness, the fifteen-year-old lad, taking his pilgrim's staff, left home to finish in this way his industrial education. The next entry dated July 22, 1839, informs us that "the bearer has

worked at his trade at master Gottfried Hanspach's, at Wurzburg, has given no cause for complaint, and now intends to return home by chance conveyance." Thus, after seven weeks of absence, he again found himself in the father's house, though the father was no longer there. Probably he was urged to this speedy return by homesickness; for, notwithstanding the presumption which the hard law had raised in his favor, he was only a boy in years and heart, though forced to assume a man's burthens. There in the modest village he found employment, and it is written that he "was at master tailor John Christ's" and conducted himself well until his departure October 17, 1839. Thence by way of several small towns he proceeded to the city of Erlangen, where he remained more than a year and a half, until May 26, 1841, at the establishment of the master tailor's widow, Sophia Maiss. Two years more were spent in the house of master tailor George Dachs, in Altenschoenbach, and here it is certified that the bearer has during his sojourn "led an entirely blameless life." More than three years he had at that time "wandered." Yet, not being physically able to perform actual military service, he was compelled by the enslaving law to add another period to his probation. He now found employment successively in Umstadt, Heddenheim, Altenschoenbach, Furth, Harburg, and Krumbach, and visited many other places among the more important of which were Donanwoerth, Bamberg, Mayence, and Frankfort on the Main. Thus it happened that not until June 25, 1846, do we find the entry that, "having satisfied the demands of the military laws, the bearer now receives permission to travel in home and foreign parts for an indefinite period. He goes to Wurzburg." He had now attained the rank of a master tailor in his village; but he was also a freeman, and by the shortest route he sought a free land. He lost no time. Taking leave of two sisters who still remained behind, he hastened to join and assist two brothers and one sister who had already begun to found a new and better home in America. The very next day, June 26, he went "by steamboat to Mayence," on June 30 to Dusseldorf, and on July 10, the last entry in this book, made at Havre, relates in the French language that he is about to depart on the ship Scotland, bound for New York. There he arrived September 1, 1846, after

a voyage of exactly seven weeks. About one month later he came to Wilkes-Barre, and obtained employment with Captain Joseph Coons, who was then, and still is, a successful merchant in this city. In the employment of Mr. Coons as a tailor he remained about two years, and then established, in a very small way, the business that, without interruption and with uniform success, he carried on until his death, August 12, 1874. Abraham Strauss was a member of the school board of this city for six years, and at the expiration of his last term refused a re-election. He was a member of the board with the writer and others when the schools took an upward start and became really *schools* instead of places where school was supposed to be kept. Mr. Strauss was a leading citizen of this city, devoted to its interests, rejoicing in its prosperity, and his death caused great regret to its citizens. The mother of Seligman J. Strauss, who is still living, is Emilie Bodenheimer, daughter of the late Jacob Bodenheimer, of the village of Baierthal, near Sinsheim, in the grand duchy of Baden, Germany. She came to this city in 1850, where her sister, Mrs. Henry Ansbacher, resided, and who had preceded her to this country. She married, July 28, 1851, Abraham Strauss. S. J. Strauss read law with Henry W. Palmer, and was admitted to the Luzerne county bar September 6, 1875.

Of the younger members of the Luzerne bar Mr. Strauss is one of the very brightest and best. Of most of our junior lawyers we may observe with truth that this one has talent in one direction, that one fitness in another. Of Mr. Strauss it is not too much to say that he has adaptability for everything that comes within the limits of a lawyer's practice. His mind is one that at once takes stern grasp of the subject he essays to understand, however multifarious its incidents, or differing its phases. There is nothing superficial in his methods. He goes at once to the marrow of a question, tests it in every light, measures it in its every possibility, and rises from his research prepared to defend his cause, however or from whatever direction it may be attacked. Many men would be incapable of this thoroughness, no matter how earnestly they should seek to acquire it. Many minds have the necessary qualities latent, but, in sympathy with the hurry and bustle of our country and times, make no effort to develop,

them. There is a popular tendency to the acquirement of a smattering of everything rather than a complete understanding in a few things. The first gives an apparent brilliancy that attracts and, when accompanied by a ready assurance and a glib tongue, even dazzles on first, or during cursory acquaintance. But it is those who are thorough in the things incident to the particular profession they have chosen, or the particular work in life to which circumstances have assigned them, who, after all, reach the top rungs of the ladder they would climb, and accomplish about all the really serviceable and enduring work done in the world. With all necessary natural talent, an excellent education, and the disposition to know everything that is to be known concerning those things which come within the line of his duty and the scope of his aspirations, Mr. Strauss has already taken a leading position at our bar, and is one of the few who are looked to to take the places of its older and more distinguished lights as in the course of nature they are called away. The same proclivity to thoroughness that distinguishes his work as a lawyer marks, also, his political researches and speeches. He is not greatly given to indulgence in campaign oratory, but consents occasionally, being a democrat of very positive character, to perform service of that kind, and on such occasions his deliverances are very certain to be marked with a carefulness, both of thought and speech, that prove his democracy to be a fixed and well digested conviction, rather than, as is too often the case with men's politics, a mere blind or inherited faith. He employs no cant phrases or tricks of speech to catch an audience, but treats democracy as a great living principle, the success of which alone can excuse or dignify the mad rush and tussle of party for power and men for office. Such speakers are not always voted the best by the rabble that attends campaign gatherings, but they are the ones who sow the seeds that fructify in the convictions that make the voice of the people the voice of God when great crises come. It must not be inferred from these facts, however, that Mr. Strauss is one of those morose, prematurely old, book worms or philosophers who bury themselves from the world in the profundity of their theories and calculations. On the contrary, he is possessed of many attractive social qualities, enjoys both home

and public entertainment, is happy in an after-dinner speech, and belongs to several societies, in one of which, a wide-spread and influential American Hebrew organization, the B'nai Brith, he now holds an office of considerable prominence and dignity. He is already the fortunate possessor of a comfortable competence, keeps open house to numerous friends, and has as few enemies as any man we know of. He has written magazine and other writings that have attracted considerable attention. As yet Mr. Strauss remains an unmarried man.

George Mortimer Lewis was born at Merryall (a name imported by his ancestors from Connecticut), in the township of Wyalusing, Bradford county, Pa., November 23, 1848. His ancestors on his father's side were of New England stock; the original settler having come from England to Massachusetts in 1630. His great-grandfather, Thomas Lewis, was a native of Fairfield, Conn., where he was born in 1745. He was the son of Thomas Lewis, who graduated from Yale College in 1741, and the grandson of Rev. Thomas Lewis, a congregational minister settled at Fairfield, Conn. He removed from Fairfield to New Milford, Conn., where he married Mary, daughter of Captain James Turrell. During the war between England and France he was prominent on the committees for raising supplies for the soldiers and recruits for the army during that period. He was a volunteer during the war of the Revolution, and at the battle of Danbury caught General Wooster as he was falling shot from his horse. After the close of the Revolutionary struggle he sold his possessions in Connecticut and removed to Pennsylvania, bringing his family on July 13, 1788, to the place now called Merryall, then in the midst of a trackless and dreary wilderness, far removed from a single habitation. His son, Justus Lewis, was a native of Wyalusing, Pa., where he was born August 24, 1787. He married December 3, 1812, Polly Keeler, daughter of Elisha Keeler, of Pike township, Bradford county, Pa. Elisha Keeler came from Brookfield, Conn., to Wyalusing in the spring of 1793. His family consisted of his wife and three children and his aged

father, also named Elisha. He died in 1814. In the same year Justus Lewis united with the Presbyterian church, and during his life was one of the most cordial and efficient coadjutors in the work of the church, contributing much towards the support of the pastor and the benevolent societies of the community. From 1837 to 1860 he actively engaged in the temperance and anti-slavery reform movements, especially during the years 1840 and 1841, when they were most warmly discussed. He was always outspoken, and no matter how unpopular his views might be, he never failed to communicate them openly and ably. In 1808 he was a federalist, in 1824 a national republican, in 1840, 1844, and 1848 an anti-slavery whig, and a strong republican from the organization of that party till the close of his life. As an energetic business man Mr. Lewis was proverbial, and in any public enterprise he was among the foremost. He died May 10, 1874, leaving seven children, to each of whom he bequeathed a rich legacy of unblemished character and a long life replete with lessons of wisdom. The father of G. Mortimer Lewis, and son of Justus Lewis, is Augustus Lewis, a native of Merryall, and for many years a prominent merchant at Wyalusing. His wife was Sarah Ingham Stone, daughter of Raphael and Sarah Stone. Mr. Stone was a son of Edmund Stone, who came from New Milford, Conn., and settled in Wyalusing in 1803. The change from the school, church, and social privileges of his former residence to the privations of the wilderness, was anything but pleasing, but the same endurance that characterized the pioneers already there before them was shown by this family also. The wife of Raphael Stone was Sarah, daughter of Jonas Ingham. He was a descendant of Jonas Ingham, an English Friend who came from old to New England about 1700, and thence to Trenton, N. J. He settled in Buckingham township, Bucks county, Pa., about 1705. He was a fuller and clothier by trade. His mills were located in that part of Buckingham township afterwards set off in Solebury township. He afterwards removed his residence to the Great Spring farm, now New Hope, in the same county. He died November 15, 1755.

Jonathan Ingham, son of the first Jonas Ingham, succeeded to the farm and fulling mill at the Great Spring and became an in-

fluent citizen. Jonas Ingham was the son of Jonathan Ingham, and a native of Bucks county. He was a fuller and clothier. In 1777 and 1778 he was in active service as a militiaman; first as lieutenant, then as captain. In this campaign, during the months of November, December, and January, he suffered much from cold, lying out of doors on the ground with no other covering than a single blanket. At the battle of Gulph Mills he was among the last to leave the grounds, and came near being taken prisoner. He married Elizabeth Beaumont of his native county, and the old homestead of the Inghams in Bucks county is now owned by Andrew J. Beaumont, of that county. In 1789 Joseph Ingham came up the river to Wyalusing and bought the Connecticut title to what had been known as "Staples pitch," and where the Skiffs had lived prior to the battle of Wyoming. Here he found the log cabin the Skiffs had built, but their clearings had grown up to brush. On this place he settled, nearly three miles from any inhabitant. In his journal Mr. Ingham says: "After the repeal of the confirming law the settling of land under the Pennsylvania title was little thought of, and the inhabitants had frequent meetings. At Tioga Point at one of them, I expressed myself with so much spirit on the subject of the repeal of the confirming law, that they saw fit to choose me one of their directors. After this I was requested to deliver a discourse on July 4, 1801, to include this subject. The discourse I delivered pleased the people very much, who were now settling under Connecticut title, and the legislature of Pennsylvania was passing very severe laws against them, as the Intrusion law and Territorial act, and the people were very much harrassed by them." In 1804 Mr. Ingham was chosen to represent Luzerne county in the state legislature, and through his efforts the obnoxious laws above referred to were repealed. The next year the whole settlement was thrown into a ferment by an ejectment suit being brought against Mr. Ingham, which was finally terminated by his purchasing the Pennsylvania title. The next year after (1806) as Mr. Robinson, a well-known surveyor, was tracing the Dundee Manor line, some of the people near Camptown, fearing that this was done to dispossess them of their lands, determined to stop the survey. Here we will let Mr. Ingham tell the story: "The

inhabitants in the settlement were all of them very averse to any surveys being made for fear of ejectments, and thereby furnishing the means for landowners to prove their rights. Some of them queried with me what kind of opposition to make. I told them to make any kind of opposition they pleased, only to kill and hurt nobody, nor let anybody appear in arms. When this surveyor came, a great many of the inhabitants collected; some in the woods shooting, others around the surveyor threatening him. I was afraid some worse mischief would happen, so I ordered some one to break the compass, or I would. Upon this one of the company broke the compass, and the surveyor went away. And not a great while afterwards a United States officer was sent to arrest those who stopped the surveyor and broke his compass, and four of them were taken and had to go to Philadelphia. I went with them to excuse them and take their part, and defend them as well as I could. Accordingly, when they appeared before the court, in the representation which I made to the lawyer who spoke for me, I took all the blame upon myself. I stated the case as it really was. I said the people were ignorant and all did what I bid them, which I thought was better than might have happened otherwise. This the lawyer stated to the court in a few words, and then expatiated largely upon the commendable part I had acted. Before he was done another lawyer got up and addressed the court, and said he was perfectly acquainted with me and that I was a very good man. Thus, contrary to my expectations, I received great honor and applause, when I apprehended I should receive severe censure and reprimand as the encourager and ringleader of outlaws. They were all dismissed to go home about their business with only paying the cost." Subsequently Mr. Ingham entered into an extensive correspondence with the Pennsylvania claimants of the land, for the purpose of obtaining from them some adjustment of the title which the Connecticut people would accept. But in this his efforts were unavailing. Mr. Ingham died suddenly in Bloomfield, N. J., October 28, 1820. Mr. Miner says of him that he possessed a mind highly cultivated by scientific research, was a model of temperance, and a promoter of the peace and harmony of society. Samuel D. Ingham, who was a member of the legislature of Penn-

sylvania in 1805, 1806, and 1807, a member of congress from 1812 to 1829, except three years while secretary of the commonwealth, and secretary of the treasury under General Jackson, which office he filled with distinguished ability, was a nephew of Jonas Ingham, being a son of his brother, Jonathan Ingham.

G. Mortimer Lewis was educated at the academy know as the Wyalusing Educational Union, and was prepared for college by his uncle, Rev. Darwin Cook, pastor of the First Presbyterian church at Wyalusing. He entered the last term of the freshman year at La Fayette in 1870, and graduated in the class of 1873. He read law with Edward P. Darling, of this city, and was admitted to the bar of Luzerne county September 6. 1875. He is the junior member of the firm of Ryman & Lewis. Mr. Lewis, as will be seen, unites in his veins the blood of two old New England families as well as that of an old Pennsylvania family, that have given to this section of our own state a number of good and influential men and women. From such an origin the qualities that win are almost necessarily inherited. Mr. Lewis is young, active, and ambitious. He is neither afraid of the hard detail work and research which the profession puts upon those who would follow it, nor of the necessity of standing before learned judges and detailing in a client's behalf the results thereof. He has a ready comprehension and an inclination to do his utmost. He prepares his cases skillfully and argues them with marked firmness and ability. In the comparatively short time he has been at the bar, he has made an excellent reputation with his brother professionals, and secured a clientage of which many an older practitioner might be proud, and which is the fruit of his individual efforts and conceded reliability and conscientious devotion to his duties. Mr. Lewis is a republican in politics, but has not held, or been an applicant for office. He is a genial young fellow and enjoys a marked social popularity, and is a bachelor.

George Riddle Wright was born in Wilkes-Barre, Pa., November 21, 1851, and is the only surviving son of the late Hendrick Bradley Wright of this city. He was educated at Edgehill school

and at the College of New Jersey, at Princeton, graduating in the class of 1873. He read law with his father, and was admitted to the bar of Luzerne county September 6, 1875. He is a director in the Wilkes-Barre Water Company, and also in the Wilkes-Barre Electric Light Company. Mr. Wright came from a family of lawyers, his father and his father's two brothers having each been prominent in the profession. Few Pennsylvanians were more widely known than the former, Hon. Hendrick B. Wright, now deceased, whose biography has already appeared in this series. Hon. Harrison Wright, though a comparatively young man when he died, had already made his mark at the bar of this county. Hon. Caleb E. Wright, the only survivor of the three, is still one of the leading members of the Bucks county bar, and resides at Doylestown in that county. The natural advantages of being derived from such stock, added to those of an education acquired at one of our very best institutions of learning, prepared the subject of our sketch for the study of the law, which he subsequently pursued in the office and under the tutelage of his father. After being admitted he practiced mainly in connection with his father, and made with him a very powerful and reliable legal combination. When the labor movement of this county was at its height Mr. Wright was offered the nomination for judge, but declined it, and William H. Stanton was nominated and elected. The circumstances of the family were such as to lift him above the necessity of practicing for a livelihood, and coming, at the death of the father, into possession of a handsome fortune, Mr. Wright, in effect, abandoned the profession, and now devotes himself mainly to the care of the estate and the pursuit of pleasure. Those who know him well feel that he has in him the material out of which successful lawyers are made, but the necessity for calling it into action is lacking. He is very popular in Wilkes-Barre's social circles, and entertains royally during the winter in his city residence, and in summer at a handsome and commodious cottage at Harvey's Lake. He is a democrat in politics, and has been several times spoken of in connection with the nomination for the legislature in the Wilkes-Barre district, but his ambition has not yet tempted him to competition for that or any other political honor. He is yet unmarried.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, MAY 1, 1885.

No. 18

Orphans' Court of Luzerne County.

ESTATE OF JACOB BILLHEIMER, DECEASED.

1. The inventory is a *prima facie* charge against executors, and credits cannot be allowed in their account for worthless debts without proof of the insolvency of the debtors, where the inventory is silent upon the subject.
2. An account may be considered a final one from its nature and character, although it be not so denominated. After the whole inventory has been accounted for, fees have been adjusted, and the whole matter has been treated by the court as finally settled, the accountants cannot, after the lapse of five years, open the same by filing what they call a final account, so as to claim credits which they allege were, by omission, left out of the former account.

Exceptions to final or supplemental account of executors.

The opinion of the court was delivered January 30, 1885, by

RHONE, P. J.—This decedent died June 2. 1869. In 1870 the executors filed a first partial account, in which they "charge themselves with the inventory as filed, except the notes and book accounts." This account was confirmed, showing a balance due to executors of \$1,868.91, but was re-stated by an auditor showing a balance due to them of \$1,937.70. In 1875 the executors filed a "further account" wherein they charged themselves with the "amounts of book accounts, notes, etc., as appraised and set forth in the inventory filed July 8, 1869, but not charged in the said first and partial account." In this last account credit was claimed for "loss on book accounts charged in the inventory, but which are desperate," giving the list; also a credit for "judgments desperate;" also a credit for "loss on notes charged in inventory but desperate;" also a credit for "notes charged in inventory but discharged by setoff;" also a credit for "accounts charged in inventory but discharged by setoff;" also with a credit for "loss on account of Henry Kahler and Isaac Klinger notes

charged in inventory." In this account commissions were claimed by executors of \$500 each and \$150 for expenses. Exceptions were filed to this account of 1875 and by agreement and request of all parties was referred to an auditor "to re-state the account, report on exceptions, and distribute the fund, etc." The auditor's report was confirmed absolutely May 31, 1879. Efforts were made from time to time to collect the amount found due from the executors to the estate as per the auditor's report, but there still remained a large sum unpaid for which an execution was issued by this court in 1883, and on March 16, 1883, pending a levy on this execution, a settlement was had between the agent for the heirs and the executors concerning some further deductions of credit claimed by the executors which had been omitted from their accounts. As a result of this settlement, the executors gave a judgment note for the balance agreed upon, to-wit, \$1,400. It is stated in the note that it is given "on settlement of a balance due on auditor's report, and as collateral security for said balance, etc." On May 12, 1884, the executors filed a "final account," charging themselves with nothing, but claiming credit for various items paid on the indebtedness of the decedent—funeral expenses, etc.—and also a credit for "commissions on \$13,369.51 received from real estate sales, three per cent., \$401.08;" and also a credit for "notes and book accounts included in inventory, but worthless," amounting to \$106.17, giving a list of the debtors. In all, the credits claimed on this account of 1884 amount to \$1,398.88. To this account exceptions were filed and are now the subject of our investigation. These exceptions, in substance, are:

I. That the credits claimed should not be allowed in this account, as they were allowed in the former accounts, or the auditor's report.

II. That the credits, if never allowed, should have been claimed in the account of 1875, as they all occurred before that date, and that was a final account.

III. That whether the account of 1875 was, or was not, a final one, the whole settlement of the estate was submitted to the auditor, whose report should be treated as a final adjudication of the matter.

IV. That whether the whole matters of the estate were, or were not, settled by the report of the auditor, the agreement of March 16, 1883, and confession of judgment and entry of the same in the Court of Common Pleas should estop the executors from any further allowance of credits.

V. That the account as filed is not properly an account, but a sort of bill of review of both former accounts and the auditor's report.

Under the *first* exception it seems the executors have no definite knowledge as to whether the credits claimed by them now were included in any former settlement or not. Mr. Kester, the acting executor, concludes by comparing the former accounts and his present vouchers that the credits now claimed were never before allowed. Mr. L. H. Bennett, Esq., a member of the bar, testifies that he had been employed by Mr. Kester to examine into the matters, and that "the result of my investigation was, that the items that are placed in the present account were items that had not been presented before the auditor, or placed in either of the former accounts, and had not been passed upon." He afterwards explains that he does not include the matter of fees to the executors. This testimony, so far as it goes, is not disputed. The reason assigned by the executors for neglecting to present these vouchers before is not that they presumed the account of 1875 was only a partial one, but that the vouchers were lost or mislaid or carelessly omitted by the counsel who stated the account. These vouchers are all dated prior to 1875, except the items paid the register and clerk on filing this account. We may concede for the argument that the credits now claimed were not withheld with a design to commit a fraud in after years, and that the error, if there be any, in the former settlement was one of mere omission. On the other hand, we have no means of determining whether or not the sums represented by the vouchers were justly due, or really paid, for there is no testimony on this point beyond the presumption of the genuineness of the signatures to the vouchers. Nor is there any proof that the credits claimed for worthless debts are, or ever were, really worthless; that is, the solvency or insolvency of the debtors named has not been made a matter of inquiry under the evidence.

The case has been submitted by the accountants on comparison of the claims with the former accounts, under the idea that if they have not been before allowed they should, as a matter of law and of course, be now allowed; while the exceptants contend that the claims should not be allowed under any and all the circumstances, their exceptions, however, do not question the original validity of the claims. If this matter were not in any way affected by the former adjudications and agreements, we could not allow the claim of credit demanded for fees to the executors, for, undoubtedly, too much has already been allowed them for the kind of services performed. Besides, that matter was clearly passed upon by the auditor and finally settled, for no services have been performed since that time. Neither could we, under any circumstances, allow the credits claimed for worthless debts without evidence of the insolvency of the debtors. The inventory is unmistakably a *prima facie* charge, and the burden is on the accountants to clearly show cause for a discharge, which they have not done. As this account was made necessary only by the neglect and default of the executors themselves, we could, under no circumstances, allow the sum paid the register and clerk. Now, suppose the balance of the claim, \$882.13, is made up of indebtedness of the decedent, and presumably valid claims, really paid by the executors without having heretofore had any credit therefor, what is the legal effect of the former adjudications on their claim? It is conceded that a partial account is only conclusive of what it contains—the items of debit and credit therein set forth—and that if any items have been omitted from it they must be embraced in a subsequent account. On the other hand, a final account is final; is conclusive of the whole matter down to the time of its confirmation, and in this respect is not unlike a settlement of accounts between merchant and customer. If there has been an error of any kind in a final settlement, such error must be pointed out within five years from the confirmation by the court. "Supplemental" accounts are allowed only to account for matters arising subsequent to a final one. It is contended by these executors that the account of 1875 is not a final one, is not so called, and has never been treated as one. That account is denominated a "further" one, and is en-

dorsed by the register a "partial" one. In the account of 1870 the accountants charge themselves with "the inventory as filed, except the notes and book accounts," and in the account of 1875 they charge themselves with "amounts of book accounts, notes, etc., as appraised and set forth in inventory filed July 8, 1869, but not charged in the first and partial account," while in this present account they charge themselves with nothing, so that on the debit side the accounting was clearly closed in 1875.

The extent and character of the credit side of the account also clearly shows an intent to make that 1875 account a final one, and the auditor certainly has treated it as such. The parties, too, have for eight years acquiesced in the decrees then entered as though they never expected any further accounting. One way of determining that an account is a final one is by calling it such, and another way of determining the fact is from its nature and character, while the conduct of the parties concerning it is equally convincing. Black, C. J., in Hubley's Appeal, 7 Harris, 142, says, "I know of no rule or principle on which an account can be called partial, which has been decreed on as final by the court, and been treated as final by all the parties to it for more than a quarter of a century." How far a final account may be held conclusive as to matters concealed by the accountant at the time of settlement, and equally unknown to the court and those interested parties who have been injured by the concealment, it is not necessary now to state, but it seems to us clear that after the five years' limitation provided by act of assembly, the accountant is precluded from alleging an error of omission in his own favor. Tested by these rules of law we are bound to conclude that the account of 1875 was a final one and cannot now be corrected. Any statute of limitation may operate unjustly in individual instances, but must be strictly construed for the general safety. Pursuing this matter further and down to the agreement of 1883, we feel bound to consider the matter closed on that score also. A lumping settlement was then had, judgment confessed and entered, and the matter acquiesced in one year more, and he cannot now rip up all these solemn transactions and judgments on the mere showing that by a comparison of vouchers with accounts error has probably been made.

The exceptions are therefore sustained, and confirmation of the account refused. The accountants are directed to pay the costs.

A. R. Brundage, Esq., for executors.

J. V. Darling and A. H. McClintock, Esqs., for heirs.

Supreme Court of Pennsylvania.

WISEMAN *et al.* APPEAL.

1. Goods in the hands of a sheriff by virtue of a *f. fa.* are subject to attachment under the act of March 17, 1869.
2. An auditor may distribute a fund to an attaching creditor under the act, without suspending proceedings, until the creditor's claim is reduced to judgment.
3. Where there are two executions in the hands of the sheriff, and also an attachment, the defendant, having waived the benefit of the three hundred dollar exemption in one of the executions, cannot set up his claim to the benefit thereof as to the attachment.

Error to the Court of Common Pleas of the county of Luzerne.

The opinion of the court was delivered April 27, 1885,

PER CURIAM.—All the assignments of error are to the refusal of the court to sustain the exceptions to the report of the auditor. An examination of the whole case convinces us that the court was right. It was admitted before the auditor that the judgment in favor of Barrett was confessed for the purpose of defrauding the honest creditors of the defendant therein, nor was it seriously contended that it was based on any valid consideration. It was, therefore, properly postponed in the distribution and the money given to the second execution. When a person who confesses a fraudulent judgment in which he has waived the benefit of the law exempting three hundred dollars' worth of property from execution, he is in no condition to claim three hundred dollars out of the proceeds of the sale. Although the judgment be invalid as to his creditors who seek to avoid it, yet as to him it remains in full force.

Decree affirmed, and appeal dismissed at costs of appellants.

Michael Cannon, Esq., for plaintiff in error.

John T. Lenahan, Esq., *contra*.

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FRIDAY, MAY 8, 1885.

No. 19

Orphans' Court of Wyoming County.

ESTATE OF DANIEL LEE, DECEASED.

Practice—Conclusiveness of decree—Setoff—Fi. Fa. from Orphans' Court.

1. Proceedings in Orphans' Court should be according to equitable forms, by petition, answer, and replication.
2. The amount found due in the hands of an administrator was distributed by an auditor, before whom a note payable to the decedent and signed by one of the heirs was presented, and a claim made that the amount thereof should be deducted from the share in the estate of said heir. The auditor held that he had no authority to make such deduction, and suggested that the administrator make a demand for the debt when the heir called for his distributive share. No exception was taken to this ruling, and the report of the auditor was confirmed. The heir subsequently asked the Orphans' Court to issue a *fi. fa.* to collect from the administrator the amount awarded him, which was less than the amount of note, whereupon the administrator resisted, claiming the right to setoff said note against such distributive share. *Held*, that the confirmation of the auditor's report was conclusive upon the parties interested, and that if any remedy existed it was by review.

Rule on behalf of J. B. Shiffer, assignee of H. W. Lee, one of the heirs of said decedent, to show cause why a *fi. fa.* shall not be issued to recover from John Lee, administrator, the amount awarded to said Shiffer on distribution of the personal estate of the decedent.

Henry W. Lee is a son of decedent. He assigned his interest in his father's estate to J. B. Shiffer. By the final account of John Lee, the administrator, there appeared to be due from him the sum of \$3,825.23. Before the auditor appointed to distribute the fund the note of H. W. Lee for \$400, payable to the decedent, was presented, and claim made that the amount of the note be deducted from the share coming to him. The auditor declined to make such deduction, but said, "the proper course to pursue is for the administrator to demand the debt when the heir

calls for the amount awarded to him in the distribution." No exception was filed to this ruling of the auditor, and his report was confirmed *nisi* by the court. Subsequently the report was modified, and the amount awarded to Shiffer reduced to \$276.67, and with such modification the report was confirmed absolutely without objections as to this point. In January, 1885, Shiffer asked for this rule. Counsel for the administrator objected to its being granted, for the reason that H. W. Lee was indebted to the estate on his said note more than his distributive share amounted to.

The opinion of the court was delivered April 7, 1885, by

ELWELL, P. J.—The Orphans' Court is a court of equity within its limits. Its proceedings should have the substance of equitable form by petition, answer, and replication in which the requisites making the case should appear. *Steffy v. Shimp's Appeal*, 76 Penn. St. 94. A rule to show cause not granted upon petition nor setting forth the grounds of the motion, is not in accordance with equity practice, but if a respondent does not object to that mode of proceeding, he should, nevertheless, file an answer which will on its face exhibit the grounds of defense against the motion. The grounds of complaint and the remedy requested should be distinctly set forth in a petition; the answer and replication should place upon record on the pleadings the matters of fact or law which are submitted to the court, thus relieving the court from the labor of examining the records, or perusing the evidence, or otherwise learning from the argument of counsel the ground of complaint and defense. This case having been submitted by counsel upon the record and their arguments, without objection as to the manner of submission on either side, I will dispose of it as if it was presented in due form. It appears by the record that an account having been settled by the administrator of Daniel Lee, an auditor was appointed to distribute the amount found due in the hands of the accountant. After a full hearing he reported that two of the heirs of decedent had received their full shares of the estate, and that the fund, after deducting costs, etc., was to be divided into five shares, instead of seven as claimed. These shares, as he reported, amounted

each to \$667.35. He reported *inter alia* distribution as follows: "To H. W. Lee, assigned to J. B. Shiffer, one-fifth, less \$200.00 paid him, \$467.35." On August 14, 1882, this report was confirmed *nisi* by the court. An issue having been granted at the request of one of the heirs whose claim was rejected by the auditor, which issue was determined in favor of the complaining heir, the court, on December 4, 1882, decided that the estate should be divided into seven shares, and that the report in other respects not material to be mentioned here, should be changed as set forth in its order, and with such modifications it was decreed that the report of the auditor be confirmed, the court appending a re-statement of the amount awarded to the distributees *inter alia* as follows: "Distributed to J. B. Shiffer, \$276.67; previously paid, \$200.00." Confirmation of the report of the auditor as modified by the court was an adjudication of the court which must stand until satisfied, reversed upon appeal, set aside on review, or otherwise stricken from the record. It is thoroughly well settled that matters which have been once determined by judicial authority cannot be again drawn into controversy between the parties and privies to the decision. Notes to *Duchess of Kingston Case*, 2 Smith's Leading Cases, 787; *Clark v. Douglass*, 62 Penn. St. 408. If there is a judgment or decree in favor of a party, definite in its terms and ripe for execution, the debtor cannot deprive the creditor of his remedy by allegations that there was a mistake or error clerical on the part of the court. Whether the reasons given by an auditor or by a court for the decision rendered are sound, is of no importance in considering the question of the right of a party to realize the fruits of a judgment. If there existed error or mistake on the part of the court, produced either by its own inadvertence or the blunder of the parties, the remedy is not by resisting process to enforce the judgment or decree. The only remedy, if any exists, is by review, in some manner, of the proceedings which resulted in the adjudication complained of. *Milne's Appeal*, 3 Out. 483., *et seq.* In this case nothing appears in the notes of evidence returned by the auditor sufficient to defeat the right of the distributee in question to his share. No exception was taken to the auditor's report awarding a sum to J. B. Shiffer, assignee of H. W. Lee,

and, therefore, the court committed no error in awarding the one-seventh of the fund to the assignee. It is a well settled rule in equity that when the court has possession of the case, it has full power to dispose of all questions which may arise, and in the decree to settle all controversies between the parties in reference to the subject in dispute. The Orphans' Court has power to determine questions both of fact and of law. It has power to inquire into and determine all questions on distribution—Dunda's Appeal, 73 Penn. St. 474—including setoff. Buckner's Estate, 9 W. N. C. 511. Where there is a dispute between assignees of a fund in court for distribution, it has jurisdiction to determine which party is entitled to the fund. McGettrick's Appeal, 98 Penn. St. 9. In determining what amount a distributee is entitled to receive out of the estate, it is competent for an auditor to determine, not only what the share of the claimant amounts to, but also what, if any, equities or legal claims existed by which there should be a deduction from the share, and upon such reduction to report as due a less sum than the amount of one share. Upon the record now before us there is a decree which entitles the complainant, J. B. Shiffer, to an execution for the sum found due him, with interest.

Rule made absolute.

W. E. and C. A. Little, for rule

Harding & Frear, *contra*.

BOOK NOTICE.

THE COLLATERAL INHERITANCE TAX OF PENNSYLVANIA, by Charles W. Boger, Esq. Rees Welsh & Company, Philadelphia, 1885. Price \$1.00.

This little monograph of forty-two pages is an excellent publication on the subject it treats. Its subjects are divided into: Persons liable to the payment of the tax; property subject to the tax; method of ascertaining the tax; collection of the tax. The work is well written, and its text is fortified by authorities from the State Reports. All executors and other persons acting in like capacity should procure a copy of the book. To the profession it is invaluable.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, MAY 15, 1885.

NO. 20

Court of Common Pleas of Wyoming County.

HERMAN, ADMINISTRATOR, *v.* ABRAHAM RINKER AND JOHN W. RINKER.

Practice — Judgments on notes more than ten years old without leave of court — Statute of limitations applicable to notes containing a confession of judgment.

1. The court has power to establish a rule governing the entry of judgments on notes containing confessions; but if judgment is entered, in disregard of the rule, the court will make such orders as will preserve the rights of the parties
2. If judgment is entered on a note, not under seal, containing a confession of judgment, which is more than six years old, the court will open such judgment to permit the defendant to plead the statute of limitations.
3. The court will not re-consider a rule which has already been passed upon by a prior judge of the court.

Rule to strike off a judgment on the ground of non-compliance with the fifteenth rule of court.

The opinion of the court was delivered April 20, 1885, by

ELWELL, P. J.—From the time of the organization of the courts under the constitution of 1790, the power of the courts to provide by rule that leave must be obtained of the court, or a judge thereof, to enter judgment on a warrant of attorney that is above ten years old, and that such leave must be based upon an affidavit of the execution of the instrument, that the parties are living and the money unpaid. The origin of the rule, and the general doctrine in respect to established rules of court and the discretion which may be exercised in administering them, are sufficiently shown by the cases of *Vannetta v. Anderson*, 3 Binney, 423; and *Gannon et al. v. Fritz*, 79 St. Rep. 303. There are numerous other authorities on the subject, but these being among

the earliest and the latest decisions, it is unnecessary to refer to others. The judge who presided in this court at the time of the entry of the judgment in question, on the affidavit of one of the defendants, granted a rule to show cause why the judgment should not be stricken off, for the reason that no affidavit had been made nor leave granted, as required by the rule of court. On the hearing of that rule the court declined to make the rule absolute, but directed that the judgment be opened and the defendants let into a defense. The counsel for the defendants thereupon excepted to so much of the ruling of the court as holds that the judgment should not be stricken off peremptorily. Conceding that the court had the power to strike off the judgment, was it bound to exercise it, there being no other reason for so doing, except that the rule of court had not been complied with? If so, the refusal was error which would entitle the defendants to redress by writ of error or other mode of removal to the Supreme Court. But if the making of the rule absolute and striking off the judgment was discretionary with the court, the matter must be considered as *res adjudicata*. Rules of court are indispensable aids in the routine business of the courts. Regularity, justice, and despatch of business are the chief objects of a general rule of court. When a rule has been established by a long course of practice or by a written order, it should, for the sake of certainty and safety, not be departed from; nevertheless, it is always in the power of a court to suspend its own rules, or to except a particular case from its operation whenever the purposes of justice require it. *Magill's Appeal*, 59 St. Rep. 430; *United States v. Brerthing*, 20 Howard, 252, note. In this case the court, by its order, preserved to the defendants all their rights of defense as fully as if an action had been brought against them on the note. By the entry of the judgment in the name of the administrator of the deceased payee of the note, the defendants are in no worse situation, in respect to the competency of themselves as witnesses, from what they would have been if the case were on trial in an action on the note. The affidavit on which the rule was granted complains of nothing, except that the rule of court has not been complied with. As before stated, Judge Ingham, in the exercise of the discretion with which the

law invested him, decided on two occasions under the circumstances as they appeared before him, that the rights of the parties would be better preserved on both sides, by the orders which he made than by a rigid enforcement of the rule. It would be highly improper, if not error, for me now, after what has occurred since the discharge of the first rule, to review and reverse the decisions which have been made in the case. Since the order opening the judgment in issue has been made up informally in this form, the note (signed by the defendants and James W. Rinker, then and at the entry of the judgment, deceased) to stand as a declaration, defendants to plead the statute of limitations; and on the bench list it is entered defendants plead the statute of limitations. It thus appears that John W. Rinker was a party to the issue. It was so understood by the court. It was so understood by the counsel on the trial of the cause. The counsel for the plaintiff asked leave to amend by striking his name from the issue, to which the counsel for the defendants objected, and obtained a ruling of the court that it could not be done, and afterwards in the Supreme Court, as appears by their counter statement, insisted that he was a party to the issue. It was held by the Supreme Court, 14 W. N. C. 542, that plaintiff should have been permitted to amend by declaring against Abraham Rinker alone. But that was not done, nor has it yet been done, so that, in fact, now the case stands for trial on the original issue. The judge who delivered the opinion of the Supreme Court says: "There seems a propriety in the present case in opening the judgment to let in the plea of the statute, inasmuch as the judgment was entered without leave of court, or the affidavit required thereby, upon a note which upon its face was then barred by the statute. In any event it was a matter in the discretion of the court, and we see no error in opening the judgment." It is true this was said in answer to complaint by the plaintiff of the act of the court in opening the judgment. It, nevertheless, seems to indicate an opinion that up to the time of the passing of the issue, or rather up to the time of the trial, the action of the court below was approved. It is said that John W. Rinker was not an actor in the proceedings which have been had up to this time, and that his application now should be consid-

ered as if the court had made no decision in the case. I cannot concur in this view of the law or the facts. If the verdict and judgment obtained by the defendants on the trial of the issue had not been reversed, John W. Rinker would have been discharged from the debt equally with Abraham. He was interested in every movement made in the case, and as the record shows, was represented by counsel. The plea for the defendants referred to no other persons than the two named upon the record. But be that as it may, I decline to strike off this judgment for the reasons that a rule for that purpose has been heretofore considered by the court, and the application to strike off refused. And for the further reason that by the order of the court for an issue the defendants are protected as fully as they would have been if proceeded against by summons in an action of debt; so understanding the law, I hold that no injustice was done by the order heretofore made, and that none will be sustained by the discharge of this rule.

Rule is discharged.

William Piatt & Sons, for rule.

John A. Sittser and Terry & Streeter, *contra*.

There are some things personal, and so inseparably connected to a man's person, that he cannot do them by another; as the doing of homage fealty. So it is holden that a lord may beat his villein, for cause or without cause, and the villein is without remedy; but if the lord command another to beat him without cause, who does accordingly, the villein shall have an action of battery against him. So if the lord distrain his tenant's cattle, when nothing is behind, yet the tenant, for the reverence and duty that appertains to the lord, shall not have trespass *vi et armis* against him; but if the lord command his bailiff or servant to distrain, *secus*.

E. B. Yordy has a few more Court Rules left. They contain the rules of the Common Pleas, Orphans' Court, Quarter Sessions Supreme Court, and Equity.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, MAY 22, 1885.

NO. 21

Court of Quarter Sessions of Luzerne County.

COMMONWEALTH *v.* GRAHAM.

Criminal law—False pretenses—Indictment—Arrest of judgment

An indictment for obtaining goods by false pretenses must state the goods to be the property of some person named, and an omission of such allegation renders the indictment incurably defective.

Motion in arrest of judgment.

The opinion of the court was delivered May 4, 1885, by

RICE, P. J.—I. All the text writers agree that an indictment for obtaining goods by false pretenses must state the goods to be the property of some person named, and where no owner is laid the indictment will be quashed. 2 Wh. C. L. 2157; 2 Bish. Cr. Pro. 1734; Wh. Pre. of Ind. 335; Arch. Cr. Pr. & Pl. *464. Our first impression was that this defect, though fatal on a motion to quash, was not available after verdict. The decisions, however, are the other way. So far as we have been able to consult them we find that they hold the defect to be one of substance and not of form, and hence is not cured by the verdict. The case of *Sill v. Reg.* 15 Eng. L. & E. 375, covers all the questions involved, and is especially applicable because it contains a construction of statutes regulating procedure in criminal cases almost precisely the same as ours. It was probably that decision which led to the passage of the English act of 24 & 25 Vict. C. 9, S. 88, which now renders an allegation of ownership unnecessary. We have no such act, and hence we feel constrained by the great weight of authority to hold that the omission of such allegation renders the indictment incurably defective. *Reg. v. Martin*, 8 A. & E. 481; *Reg. v. Norton*, 8 C. & P. 196; *State v. Smith*, 8 Blackf. 489; *State v. Lathrop*, 15 Vt. 279; *Thompson v. People*, 24 Ill. 61. The second reason is not

well founded in fact, but even if it were it would be no cause for arresting the judgment.

For the first reason filed it is ordered that judgment be arrested.

Court of Quarter Sessions of Luzerne County.

COMMONWEALTH *v.* BRYANT.

Criminal law—Malicious mischief.

The destruction of a boat may be the subject of indictment for malicious mischief at common law.

Motion in arrest of judgment and rule for a new trial.

The opinion of the court was delivered September 2, 1884, by

RICE, P. J.—The defendant was indicted and convicted for having wilfully, maliciously, and mischievously cut and destroyed a certain boat, the property of the prosecutor. The reason assigned for arrest of judgment is that the indictment does not set forth an offense punishable by indictment, either at common law or under any statute of Pennsylvania. The offense charged is not within any of our statutes, but without elaborating upon the question discussed, we conclude from an examination of the authorities that the destruction of a boat may be the subject of indictment for malicious mischief at common law (see *Loomis v. Edgerton*, 19 Wend. 420; *Com. v. Cramer*, 2 Pears. 441; 2 Wh. Cr. L. 2002, etc.), and that under sec. 11 of the criminal procedure act of 1860, which provides, that "every indictment shall be deemed and adjudged sufficient and good at law which charges the * * * if at common law, so plainly that the nature of the offense charged may be easily understood by the jury," the offense is sufficiently well described to sustain judgment on the verdict. As no opinion was given it is not possible to tell the precise ground upon which the court quashed the indictment in *Com. v. Casperson*, 14 W. N. C. 106, but it is quite probable that it was because that indictment did not aver that the act was done mischievously, or with malice, against the owner. (See 2 Wh. Cr. L. 2012, b.) We are far from satisfied, however, that there was sufficient evidence of malice. It was thought on the

trial, and quite likely the jury got the same idea, that the declarations of the defendant furnished the evidence of his having sawed the boat in two out of revenge against the prosecutor. An examination of the defendant's testimony shows that he was entirely misunderstood. Except upon the theory that the defendant, enraged because his own boat had been sawed in two, retaliated by sawing that of the prosecutor, no argument could have been successfully made from the evidence that he acted maliciously. But this theory is not sustained by the evidence which shows that the prosecutor's boat was sawed first because, as the defendant supposed, it was worthless and had no owner. The following day he found his own boat sawed, and supposing that it had been done by the prosecutor as a retaliatory act, he upbraided him for it, and then the wordy altercation ensued which he narrates. The case is not of serious importance in its consequence to the defendant, but, nevertheless, it is our duty to set aside a verdict of conviction, even in such a case, if it is clearly against the weight of the evidence.

The motion in arrest of judgment is overruled, and the rule for a new trial is made absolute.

Court of Common Pleas of Luzerne County.

HOLLENBACK v. WELLER *et al.*

1. The action of trespass for cutting timber trees, if brought under the act of March 29, 1824, can only be maintained by the owner.
2. The plaintiff had the undisputed legal title to an undivided three-fifths part of the *locus in quo*, and by the express reservation of his deed to Osborne as trustee, he was to receive and receipt for the rents, issues, and profits arising from the whole estate or land, to develop, improve and sell the same, without joinder of the trustee, to expend such moneys thereon as he might deem necessary, and to account for and pay over to the trustee two-fifths of the rents, issues, and profits received. *Held*, that the possession and legal dominion of the plaintiff over the land were such as to constitute him the owner, and to entitle him to maintain the action under the act of 1824 against a trespasser.

Motion for judgment on the verdict.

The opinion of the court was delivered May 9, 1881, by

RICE, P. J.—We deem it unnecessary, and therefore unwise, to discuss and pass upon the estate of the *cestui que trustent* under the deed from J. W. Hollenback to General Osborne, as

trustee, and the agreement of compromise in pursuance whereof it was made. There are questions between the parties to those instruments suggested by an examination and comparison of them which cannot be settled in this form of action and in this collateral proceeding. The only question raised by the reserved points is, whether the plaintiff can maintain this action as the owner of the *locus in quo* within the meaning of the act of 1824, against one who has cut and removed timber without authority or license. To support trespass there must be in the plaintiff, at the time of the act complained of, either actual possession or the right of immediate actual possession flowing from the right of property. *Lewis v. Carson*, 3 H. 34. This general definition does not, however, exactly apply to the statutory action given by the act of 1824, for the damages awarded under that act go to the owner, "that is, to the person to whom the thing belongs, the master or rightful owner thereof; a description which does not apply to the character of tenant." *Tammany v. Whitaker*, 4 W. 221. But, notwithstanding this action is given to the owner, and not to a mere possessor, the interest which the defendant has in the joinder of all the owners must be chiefly to prevent a second recovery for the same trespass, and the term owner cannot be given such a technical meaning as to authorize the defendant's pleading that there was an outstanding equity in some stranger to the action, under whom he did not pretend to claim, and thus defeat the action. The plaintiff has the undisputed legal title to an undivided three-fifths part of the premises, and by the express reservation or proviso of his deed to General Osborne, a trustee, he is to receipt for and receive the rents, issues, and profits arising from the whole estate or land, to develop, improve, and sell the same without joinder of the trustee, to expend such moneys thereon as he may deem necessary, and to account for and pay over to the trustee two-fifths of the rents, issues, and profits received. It seems quite clear that a recovery by him must be a recovery by the trustee for the same trespass, and that his possession and legal dominion over the land are such as to constitute him the owner as against a trespasser.

Upon payment of the jury fee it is ordered that judgment be entered for the plaintiff on the verdict.

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Court of Quarter Sessions of Luzerne County.

IN RE ADMISSION OF ADJACENT TERRITORY INTO THE BOROUGH OF PITTSTON.

Boroughs.

Where adjacent territory is admitted into a borough by the borough authorities under section 30 of the act of 1851, and no appeal is taken under section 4 of the act of 1871, the annexation becomes complete upon the expiration of the time allowed for appeal, without confirmation by the court or approval by the grand jury.

The opinion of the court was delivered May 25, 1885, by

RICE, P. J.—An ordinance of the borough of Pittston, approved by the burgess March 11, 1884, declared and provided *inter alia* as follows: "Section 1. That upon petition of at least twenty freeholders of, and residents upon, property embraced in the section of Pittston township lying adjacent to said Pittston borough and hereinafter described, the said section is hereby admitted as part of the Fourth ward of said Pittston borough." (Here follows a description of the territory admitted.) A copy of the borough ordinance, together with a plan or plot of the adjacent territory, were filed in the office of the clerk of this court on March, 26, 1884, and after publication of notice thereof for three consecutive weeks the same were laid before the court, and on May 3, 1884, the court made an order confirming the same. On October 25, 1884, by consent of all parties concerned, the court made an order striking off the confirmation of the proceedings, and on the same day granted a rule to show cause why the order of confirmation should not be reinstated. This rule is

now before us for disposition, and the question is, whether the attempted annexation of the adjacent territory was regular and complete without a submission of the proposition to the grand jury. Under the act of April 1, 1834, the jurisdiction to change the limits of a borough was vested exclusively in the court. The mode of procedure was the same as in the incorporation of a borough and, of course, included a reference to, and approval by, the grand jury. By the 30th section of the act of 1851 the burgess and council are directed and required, "on the petition of not less than twenty freeholders, owners of lots in any section whereon the petitioners and others reside, adjacent to the borough, to declare by ordinance the admission of such section as part of the borough. This provides for a single case, and upon no other conditions have the borough officers anything to do with changing borough limits." *McFate's Appeal*, 14 W. N. C. 543. Where, as in this case, the proceedings were under the act of 1851, they did not come before the court, either for approval or disapproval, but became complete without any action of the court upon compliance with the conditions of the act. (See *Devores' Appeal*, 6 Sm. 163.) Subsequent legislation has made no change in the law affecting the present question. The 1st section of the act of June 2, 1871, P. L. 283, has reference only to applications *to the court* for incorporation, and to change the limits of a borough. Section 4 of the latter act refers to extension of the limits of a borough by the action of the borough officers under the act of 1851. As an additional safeguard to citizens to be affected it gives a right of appeal to the court, and then, and then only, has the court power to act upon the proceedings. The act of June 11, 1879, P. L. 150, and the act of May 17, 1883, P. L. 36, like the 1st section of the act of 1871, relate to changes of borough limits by application to court, and not to an extension by the borough authorities. Therefore they do not apply to the present case. In the present proceedings no appeal was taken as provided in section 4 of the act of 1871. It follows that the annexation of the adjacent territory became complete upon the expiration of the time allowed for appeal, and that the court has no jurisdiction to confirm or set aside the proceedings.

It appearing to the court that these proceedings were under section 30 of the act of April 3, 1851, P. L. 325, that no appeal was taken as provided by section 4 of the act of June 2, 1871, P. L. 283, and that, therefore, the court had no jurisdiction in the premises, the rule granted October 25th, 1884, is dismissed.

Edward Ambrose Lynch was born at Nesquehoning, Carbon county, Pa., August 15, 1853. He is the son of the late Patrick Lynch, of this city, who emigrated from Cavan, Ireland, to this country in 1830. Mr. Lynch read law with the legal firm of Rhone & Lynch, and was admitted to the Luzerne bar September 11, 1875. He was educated in the public schools and at Wyoming Seminary, and in his younger days learned the art of printing, serving an apprenticeship with Robert Baur, of the *Democratic Wæchter*, of this city. He is a brother of John Lynch of the Luzerne bar. Mr. Lynch has talents which, if energetically cultivated, will make him a useful member of the bar. He is young, content to make haste slowly, but creditably assiduous to earn his retainers. He is a democrat, has a taste for politics, but has not sought office, and is unmarried.

Charles Huston Sturdevant was born in Bellefonte, Centre county, Pa., May 18, 1848. He is the son of the late E. W. Sturdevant, of the Luzerne county bar, whose biography has already appeared in this series. The mother of Charles H. Sturdevant was Lucy, daughter of Charles Huston, at one time a judge of the Supreme Court of Pennsylvania, and one of the most distinguished jurists of the country. He was born in Plumstead township, Bucks county, Pa., in 1771. His grandfather came from Ayrshire, Scotland, and he was Scotch-Irish in descent. He probably finished his studies at Dickinson College, Carlisle, Pa., where he was professor of Latin and Greek in 1792. He was studying law at the same time, and while there he completed his legal studies, was admitted to the bar in 1795,

and settled in Lycoming county—cut off from Northumberland the preceding winter. Among his pupils in the languages was the late Chief Justice Taney, who placed a high estimate on the character of Judge Huston. In his autobiography the chief justice says of him, "I need not speak of his character and capacity; for he afterwards became one of the first jurists of the country. He was an accomplished Latin and Greek scholar, and happy in his mode of instruction. And when he saw that a boy was disposed to study, his manner to him was that of a companion and friend, aiding him in his difficulties. The whole school under his care was much attached to him." Judge Huston was commissioned a justice of the Supreme Court April 27, 1826, and retired from the bench in January, 1845. The last time he sat on the supreme bench at Pittsburg he boarded privately with the sheriff, who kept house in the jail. He was much annoyed by a correspondent writing to one of the newspapers, "one of our supreme judges (Huston) is in jail," which put him to the trouble of writing to his friends and explaining how he happened, on that particular occasion, to be on the wrong side of the bars. With a rough exterior, he was as gentle as a child, with all its truthfulness and fidelity. After he retired from the bench he wrote a work on "Land Titles in Pennsylvania," which was published in 1849. He left his manuscript on his table by the side of a candle one evening while he went to tea. It caught fire, and when he returned he found his labor of years nearly consumed. But with his accustomed determination he re-wrote the work, almost entirely from memory. Judge Huston died November 10, 1848, in his seventy-eighth year. He left two daughters, one of whom married E. W. Sturdevant, and the other became the wife of the late James Hale, member of congress and judge of the Clearfield district. C. H. Sturdevant was educated at the academy of W. S. Parsons in Wilkes-Barre, and at Hobart College, Geneva, N. Y., and graduated from the latter institution in the class of 1869. He read law with E. P. Darling, of this city and was admitted to the Luzerne county bar October 4, 1875. Mr. Sturdevant, coming from a parent stock that has been fruitful of good and competent men and women, and having had the advantages of a liberal education, found himself, upon admission to

the bar, equipped to become one of its most useful and active members. He is not one of the pushers of the profession, however, having means and other prospects sufficient to relieve him of necessity for depending upon it, and being content to take the legal world pretty much as it comes. He has done some legal work and done it well, and is capable of more and better. He is well read in general literature, popular in society, and not much given to politics.

Frank Caleb Sturges was born in the village of Greenfield Hill, Fairfield county, Conn., March 12, 1854. He is a descendant of Roger Sturgis, of Clipston, Northamptonshire, England, whose will is dated November 10, 1530, and who had a son Robert, who had a son Roger, who had a son Robert, who had a son Edward. This last named removed to New England and settled in Charlestown, Mass., in 1634. He subsequently settled in Yarmouth. Edward had a son Peter, who had a son Christopher, who had a son Joseph. He settled in Stamford, Conn., where his son Lewis was born July 15, 1756, and died in 1838. His wife was Mary Porter. His son, Joseph Porter Sturges, was born in 1784, and died in 1861. His wife was Laura, daughter of Thomas H. Benedict. He was a descendant of Thomas Benedict, whose history is given in "The Genealogy of the Benedicts in America," by Henry Marvin Benedict. He thus speaks of Thomas Benedict: Among those Englishmen who went into voluntary exile rather than endure the cruelties and oppressions of Stuarts in the state and lands and in the church, was Thomas Benedict, of Nottinghamshire. There is reason to suppose that his own remote ancestor had made England his refuge from religious persecution on the Continent. There was a tradition in his family which ran, that anciently they resided in the silk manufacturing district of France, and were of Latin origin; that Huguenot persecutions arising they fled to Germany and thence by way of Holland to England. It is said of Thomas Benedict that he was born in 1617; that he was an only son; that the name had been confined to only sons in the family for more than a hundred years; and that at the time he left England he did not know of another living person of the name; whence

it is assumed that his father was not living. Hinman says, "Thomas Benedict was the only early settler found in the colony of Connecticut of the name of Benedict." The mother of Thomas Benedict died early, his father marrying for his second wife a widow, whose daughter, Mary Bridgum, came to New England in 1638, in the same vessel with Thomas, then in his twenty-first year. Soon after their arrival they were married, and, finding the society and institutions of Massachusetts Bay congenial, they resided in that colony for a time. These facts in the history of Thomas Benedict are verified by the testimony of Mary Bridgum herself, who lived to the age of one hundred years, and in her life-time communicated them to her grandson, Deacon James Benedict, of Ridgefield, Conn., who recorded them in 1755. In June, 1657, Thomas Benedict was a resident of Huntington, and in 1640 was an inhabitant of Southold. There are traces of his presence in Jamaica as early as December 12, 1662, when, in conjunction with two others, he was appointed to lay out "the south meadows." On March 20, 1663, he was appointed a magistrate by the Dutch governor, Stuyvesant, an honor, it is to be feared, which he never requited by loyalty to the Dutch government. On September 29, 1663, we find him, with other inhabitants of towns on the west end of Long Island, petitioning the General Court of Connecticut to be what in our day would be termed annexed to the colony. He was, in fact, one of the bearers of this petition to the court at Hartford, November 3, 1663. On December 3, 1663, he was appointed lieutenant of the town. He held the office of commissioner when the Dutch governor, Stuyvesant, surrendered New York and its dependencies to the English under Colonel Richard Nichols. He was a member of "a General Meeting" held on the last day of February, 1665. This is thought to be the first English legislative body convened in New York. The same year he was appointed by Governor Nichols lieutenant of the foot company of Jamaica. The fact that in this same year he is recorded as having been chosen town clerk of Norwalk, Conn., gives color to the supposition that some confusion of dates was occasioned about this time by the introduction into the possessions acquired from the Dutch of the style in use in England then, and for many years afterwards, and

also from the practice of double dating. A flight to the jurisdiction of New England from that of New York, whose governor must have seemed a lineal representative of the persecutors who had driven the Puritans from the mother country, would not be a suprising thing in the case of any of that people. In that of Thomas Benedict it was a most natural result. The following year he was made a selectman of the town. He was continued town clerk until 1674, and after an interval of three years was again appointed. His term of service as selectman covers seventeen years, closing with 1688. His name is one of forty-two who comprised the list of freemen in 1669. He was the representative of Norwalk in the general assembly in 1670, and again in 1675. In the patent granted by the General Court in 1686, confirming the title of Norwalk to its territory, his name is inserted as a patentee. In May, 1684, the General Court appointed him and three others to plant a town above "Norwalke or Fayrefield," at Paquage; and in the fall of that year and the spring of 1685, Samuel and James, sons of Thomas, and six others, with their families, settled there, the land having been purchased from the Indians. The parties most interested asked that their settlement might be named "Swanfield," but in 1687 the General Court denied their request and called it Danbury. He is identified with the founding of the first Presbyterian church in America, at Jamaica, in 1662; and during the term of his residence there he was of the committee to make the rate and provide the means to support its minister. In Norwalk he was chosen deacon and held the office during his life. He died November 20, 1689. Lieutenant Daniel Benedict, son of Thomas Benedict, was born at Southold, Long Island, and after his removal to Norwalk, Conn., married Mary, daughter of Matthew Marvin. He was a soldier in the swamp fight, December 19, 1675, which has scarcely a parallel in the annals of ancient or modern warfare. At a town (Norwalk) meeting, January, 12, 1676: "The towne, in consideration of the good service that the soldiers sent out of the towne ingaged and performed by them, and out of respect and thankfulness to the sayd soldiers, doe, with one consent and freely, give and grant to so many as were in the direful swamp fight twelve acors of land, and eight acors of land to so many as

were in the next considerable service." In 1690 he removed to Danbury, Conn. The date of his death is not known. Mrs. Sturges was the great-great-granddaughter of Lieutenant Daniel Benedict. Rev. Thomas Benedict Sturges is the son of Joseph Porter Sturges and his wife, Laura Benedict, and was born in Bridgeport, Conn., in 1812. He is still living at Greenfield Hill, where for thirty years he was the Congregational minister of that village. It is a fact worthy of note that the only vote he ever cast for a presidential candidate was for James G. Blaine in 1884. His wife, who is still living, is Hannah West Baker, daughter of the late Chauncy Baker, of Sacketts Harbor, N. Y. Mr. Baker was bred a farmer, and settled at Sacketts Harbor, was sheriff of Jefferson county, N. Y., cashier of the bank, a very intellectual man, of active business habits, and a devoted member of the Presbyterian church. After the decease of his wife his health declined, and he was induced to try a warmer climate, for which purpose he went to Cuba, where he died of consumption February 28, 1841, aged forty-two years. Mrs. Baker was the daughter of Josiah Pratt, of Ellisburg, Jefferson county, N. Y. He commenced a sea-faring life at the age of seventeen, and until the war of 1812 was mate or commander of a vessel, when he sold his possessions in Saybrook, Conn., and removed to the state of New York, where he died. He was a descendant of Lieutenant William Pratt, who is supposed to have come from Hertfordshire, England, to Cambridge, Mass., in 1633, and thence to Hartford, Conn., in 1636, and subsequently to Saybrook. The precise date of his decease is not known. He attended the General Court as a deputy from Saybrook the twenty-third and last time at the session which convened at Hartford in 1678. Captain William Pratt, son of Lieutenant William Pratt, settled at Saybrook, February 20, 1768. He was a man of note in the civil, military, and religious affairs of the town, being often appointed selectman, surveyor, captain of the militia, and on committees of the church. Mrs. Sturges was the great-great-granddaughter of Captain William Pratt.

Frank Caleb Sturges is the son of Rev. Thomas Benedict Sturges, and was educated at the academy in his native town, and also in the academy at Easton, Conn. He studied law with his

brother, E. B. Sturges, of the Lackawanna county bar, and was admitted to the Luzerne county bar October 18, 1875. He married, April 1, 1880, Frances E. Lazarus, daughter of the late Daniel Lazarus, of this city, who was a son of John Lazarus, a native of Northampton county, Pa. Mr. and Mrs. Sturges have but one child, Thomas Benedict Sturges. Mr. Sturges is a man of fine qualifications for the profession he has chosen. He brings with him from "the land of steady habits" a disposition very aptly defined in that title, and that, we need not say, is likely to be serviceable to any young man who undertakes to give his life to, and stake his chances upon, the practice of the law. Reliability in the matter of a lawyer's promises, for instance, is better for the client, and a better stock in trade, even when unaccompanied by brilliancy, than the brilliancy that lacks it for a companion quality. Studiouness in research and persistency of quiet devotion to a cause, in like manner do well as substitutes for that faculty, which only a few possess, and most of those few abuse, of carrying the law at one's finger ends. Steady habits, when accompanied by even very moderate ability, generally make their way in the world, and, as we have already in effect said, Mr. Sturges unites with them a very creditable understanding and appreciation of the principles of the law and skill in applying them.

John Butler Reynolds was born in Wilkes-Barre, Pa., August 5, 1850. He is the son of the late Elijah W. Reynolds, for many years a prominent merchant in Wilkes-Barre, whose home during the latter years of his life was in Kingston, and grandson of Benjamin Reynolds, who was a representative and substantial man, and who was sheriff of Luzerne county from 1831 to 1834. He was also for many years a justice of the peace in Plymouth. E. W. Reynolds from May, 1848, to May, 1849, was president of the town council of the borough of Wilkes-Barre. For many years he was a director in the Wyoming Bank at Wilkes-Barre. Although a very popular man and a democrat in politics, he uniformly declined being a candidate for any political office. The mother of J. B. Reynolds is Mary, a daughter of the late

Pierce Butler. He was a son of the late General Lord Butler, and grandson of Colonel Zebulon Butler. He was a farmer and the very soul of generosity. His deeds of benevolence are still fresh in the memory of many persons who yet remain with us. The mother of Pierce Butler was Mary Pierce, daughter of Abel Pierce. He settled in Kingston before the massacre, on the river bank opposite the present city of Wilkes-Barre. Doctor Peck, in his History of Early Methodism, says: Mrs. Ruth Pierce, wife of Abel Pierce, became an early convert to Methodism, and her house was a most pleasant home for the preachers. 'Grandmother Pierce' was at all the meetings in Wilkes-Barre when the writer traveled the Wyoming circuit in 1818 and 1819, and then she was the life of every circle she entered. She was independent, frank, earnest, kindhearted, sociable, and not a little eccentric. * * * Methodism owes much to the Pierce family, but principally to the female portion of it." The wife of Pierce Butler was Temperance Colt, a daughter of Arnold Colt. He was a son of Harris Colt, and grandson of Benjamin Colt, an early settler in Lyme, New London county, Conn. Arnold Colt was born in Lyme September 10, 1760. He learned the trade of a blacksmith and of a general worker in iron, and in the year 1786 emigrated from Connecticut to the Wyoming Valley. In 1788 he married Lucinda Yarrington, daughter of Abel Yarrington, a native of Norwich, Conn., and one of the early settlers in Wyoming, and who for many years was collector of taxes and keeper of the Wilkes-Barre and Kingston ferry. He remained at his post at the ferry on the day of the massacre until the yell of the savages announced their approach. He then took his family in the ferry boat, descended the river and found welcome and safety among the benevolent inhabitants at Fort Augusta, now Sunbury, Pa. From 1790 to 1793, and from 1795 to 1801, he was coroner of Luzerne county, and for several years he was treasurer of the county. In 1790 Arnold Colt was appointed collector of excise for Luzerne county, and in 1791 he was re-appointed, and in the same year was appointed justice of the peace for Wilkes-Barre township. He served as ensign in the company of infantry commanded by Captain Samuel Bownian, which was sent into western Pennsylvania in 1794 to assist in quelling the whisky insur-

rection. In 1795 he moved with his family to Tioga Point, Luzerne county, now Athens, Bradford county. While residing there in 1798 he was elected sheriff of Luzerne county, and soon thereafter removed to Wilkes-Barre. In 1799 he was United States assessor for Luzerne county. From 1801 to 1804, and again from 1825 to 1828, he was one of the commissioners of Luzerne county. He was elected in May, 1806, a member of the first borough council of Wilkes-Barre. From 1807 to 1811 he was one of the trustees of the old Wilkes-Barre Academy. For many years he was clerk to the board of county commissioners. From May, 1826, to May, 1827, and from May, 1828, to May, 1829, he was president of the town council of Wilkes-Barre. He was a member of the first board of managers of the Easton and Wilkes-Barre turnpike, and continued in the board for about fifteen years.

J. B. Reynolds studied law with W. W. Lathrope, then of the Luzerne, now of the Lackawanna, county bar, and was admitted to the bar of Luzerne county November 15, 1875. He was educated at Wyoming Seminary and La Fayette College at Easton. For the last four years he has been one of the examiners of the Orphans' Court of Luzerne county, and during a portion of that time was the only examiner. In 1884 he was a delegate to the state convention which convened at Allentown, Pa., and was selected as one of the delegates to the national convention which met at Chicago. As Lackawanna county had not a delegate, Mr. Reynolds resigned his position, so as to allow them to select one. He married, October 21, 1879, Emily Bradley Dain, of Peekskill, N. Y. She is the daughter of Nathaniel Dain, a native of Lisbon, Me., and a graduate of Bowdoin College. Mr. Dain studied medicine and practiced for awhile in Boston, Mass., but his health failing him he began to travel; went west, and returning settled at Peekskill and engaged in the lumber trade, which he has continued until the present time. Mr. and Mrs. Reynolds have two children living, Pierce Butler Reynolds, and Eugene Beaumont Reynolds. Mr. Reynolds is a lawyer of good attainments. Although without pretensions to forensic skill, he makes a strong argument, whether in court or upon the stump. His style is but little more than conversational, yet is not without a certain grace

that adds no little to its effectiveness. As the standard of intelligence in jurors rises—the rise should be, but is not always, in proportion to the increasing intelligence of the whole people—dependence upon this method of oratory in jury trials becomes at once more common and more effective. It almost invariably is preferable from every point of view when the bench is to be addressed. It will be a better day for clients when juries as well as judges look more to the substance than to the verbal garniture of a presentation or a summing up. In his capacity as Orphans' Court examiner Mr. Reynolds' knowledge of this branch of the law has been materially enhanced and brightened. Several cases with which he has been called to deal in that capacity exhibit strong evidence of his persistence and patience in investigation, and correct and discriminating judgment. Mr. Reynolds' name has been many times mentioned as that of a probable democratic candidate for district attorney. That distinction would, in all probability, have been already accorded him but for the assumed political necessity of distributing the party nominations each year among the numerous nationalities of which the party is composed, and the numerous towns, or sections, to which the county extends. He was a prominent candidate for the position of collector of internal revenue for the Tenth district, lately filled by the appointment of Charles B. Staples, Esq., of Stroudsburg, Monroe county. Here again locality was against him. The very formidable array of leading citizens who endorsed his application attested the high esteem in which he is held in the district, but the appointment had been conceded to Congressman Storm who, admitting Mr. Reynolds' fitness and deserving, made, for reasons which he deemed sufficient, a different selection. Mr. Reynolds is young, ambitious, of good social standing, well read in general literature, and in every particular a good citizen.

John Asahel Gorman was born in Hazleton September 7, 1854 and was there educated in the public schools. His father, John Gorman, has been a resident of Hazleton for many years. He is now, and has been for the past fifteen years, a justice of the

peace of that borough, and has also been United States assistant assessor of internal revenue, councilman, poor director, and one of the directors of the public schools. He is a native of Cashel, in the county of Tipperary, Ireland, and emigrated with his father, also named John Gorman, at the age of eighteen years to this country, settling at St. Josephs, Susquehanna county, where his father lies buried. The mother of John A. Gorman is Sarah Ann Shipman, a daughter of Asahel Shipman. She is a native of Dover, N. J. Her parents removed to Hazleton, where she met the father of the subject of our sketch, and was there married. John A. Gorman studied law with the late Jabez Alsover, of Hazleton, and completed his legal studies with the legal firm of Little & Blakeslee, at Montrose, Pa. He was admitted to the bar of Susquehanna county August 15, 1875, and to the bar of Luzerne county January 10, 1876. He has never held any political office, and is a democrat in politics. He married, October 10, 1876, Ellen Kelley, a daughter of Cornelius Kelley, of Hazle township. Her father is a native of county Leitrim, Ireland. Mr. and Mrs. Gorman have two children living, James Gorman and Cornelius Gorman. Mr. Gorman has, from the beginning of his practice, held a leading position in the profession in what is known as "the lower end" of the county, where Hazleton is located. There are material specialties in the demands made upon a lawyer practicing at a point distant from a county seat, and it has been Hazleton's misfortune that, while but twenty-five miles, or thereabouts, from Wilkes-Barre, as the bird flies, it is several times that by the shortest rail route. Practice before the justices covers a higher and more important character of cases, and office practice is different. These facts give a really good lawyer so situated a better opportunity of earning both reputation and money than might be supposed by those who neglect to take them into consideration. Mr. Gorman, in his comparatively short time at the bar, has made excellent use of his opportunity. He has also brought a good deal of business from Hazleton and that vicinity to the courts, where he has acquitted himself of it very creditably. He has a natural tendency to politics, and is a democrat. Though never himself a candidate for office, he has frequently served on committees, and otherwise in a leading ca-

capacity, during campaigns. He delights in helping friends at the primary elections and in conventions, and in that way has from time to time exerted much influence. He is an earnest and impressive talker, has an energy that carries him vigorously forward in any cause in which his sympathies are enlisted, and enjoys a considerable popularity in his section.

Andrew Hamilton McClintock was born in Wilkes-Barre, Pa., December 12, 1852. He is the only son of Andrew Todd McClintock, LL.D., the senior member of the Luzerne county bar, whose biography has already appeared in this series. His mother is Augusta Bradley McClintock (*nee* Cist), a daughter of the late Jacob Cist, of this city. Mr. McClintock was educated at the College of New Jersey, at Princeton, and graduated in the class of 1872. He read law with his father, also with E. P. & J. V. Darling, and was admitted to the bar of Luzerne county January, 20, 1876. He married, December 1, 1880, Eleanor Welles, a daughter of Charles F. Welles, jun. He was a native of Bradford county, Pa., and was born about the year 1812. He received his education in the schools of his neighborhood, and early commenced business life in the pursuits of farming, lumbering, and merchandizing. His first ventures on his own account were in the lumber trade. He was in the habit, in the spring of the year, during the "freshet" season, of constructing "rafts," which he would float down the Susquehanna to Middletown, Columbia, or Port Deposit, where he would find a market. Often, upon his passage down the river, he would purchase other "rafts," thus accumulating large quantities of lumber, and greatly increasing his profit. On one occasion meeting with an opportunity for an unusually profitable investment, but lacking the capital necessary to embark in the speculation, he concluded to, and did, make application to George M. Hollenback, of Wilkes-Barre, for assistance. Being known to that gentleman as an industrious, energetic, honest young man, he received, without security, for he had none to offer other than his good name, the required assistance. The investment proved successful, the borrowed money

was duly returned, and the borrower and lender, in this instance, became life-long friends. Having been uniformly prosperous in his transactions in lumber, and having accumulated thereby some capital, he, about the year 1835, purchased the stock for a small country store, the building for which he erected in his native township between the time of his purchase of the supplies in Philadelphia and their arrival at his home. Good fortune continuing to follow him in his mercantile ventures, he established branch stores along the line of construction on the North Branch Canal, and continued these commercial pursuits until the suspension of that public work. In 1843 he removed to Athens, Pa., and entered into business on a largely extended scale, but finally relinquished all connection with trade, in order to devote his entire attention to large and lucrative operations in public works and the construction of great improvements. Among the many railroad, and other enterprises, in which he was engaged, the following are but a few: In 1850 and 1851 he contracted to build a section of fourteen miles on the New York & Erie railroad near Hornellsville; in 1852, forty-five miles of the Buffalo and State Line railroad; in 1854, forty-five miles of the second track of the Erie railroad, from Owego to the junction west of Elmira; also the second track of the same road from Deposit to Lanesboro; also the second track on the same road from Port Jervis to Otisville. One of the largest contracts into which he ever entered was the construction of that part of the Delaware, Lackawanna & Western railroad east of Scranton. This was a remarkably heavy work, much of it costing in the neighborhood of one hundred thousand dollars per mile to grade, the supplies for which had to be transported from thirty to fifty miles in wagons over a mountainous road. In the completion of this undertaking he displayed great energy and untiring industry. Immediately after he undertook the construction of a large portion of the Warren railroad in New Jersey, and the Lackawanna & Bloomsburg railroad extending from Scranton, Pa., to Bloomsburg, through the coal regions of the Lackawanna and Wyoming Valleys. For several years he was president of this road. In 1856 he constructed the Brunswick & Florida railroad, and was its president for two years, when he

resigned. The governor of Pennsylvania refusing to sign an appropriation for the completion of the North Branch Canal unless a northern connection was first secured with the canal system of New York, he, in 1854, induced several of his friends to join him in furnishing the capital to construct the Junction Canal, extending from the Chemung Canal at Elmira, N. Y., to the state line near Waverly. The North Branch Canal being subsequently closed, he and his associates who joined in the enterprise lost the entire investment. In 1856 he, in connection with his partner and cousin, Henry S. Welles, contracted to erect the Brooklyn water works. Previous to this they had undertaken to supply the city of Williamsburg with water from certain lakes and water courses on Long Island; and during the progress of the work the contract was entered into to construct the extensive reservoirs to supply the consolidated cities. This important work was completed in the most satisfactory manner, at a cost of about five millions of dollars. The energy and financial ability which were required to successfully accomplish this great undertaking in the midst of the money crisis of 1857, when many of the oldest and hitherto most reliable business houses in the country were prostrated, are especially worthy of notice. In 1857 he purchased a half interest in an extensive lumber establishment at Menominee river, on Green Bay, which, after holding for about seven years, he disposed of on advantageous terms. In 1859 he bought the entire line of the North Branch Canal and, having sold the portion extending from Wilkes-Barre southward, he organized the North Branch Canal Company and shipped the first Wyoming coal to Chicago and the west, thus inaugurating a trade which has since had a large expansion. His main object in securing this canal—a purchase he made known to only a few confidential friends—was to change it to a railway route. In pursuance of this project the "Pennsylvania & New York Canal and Railroad Company" was subsequently formed, and its franchises sold in 1865 to the "Lehigh Valley Railroad Company." Under the auspices of the latter company the railway, now known as the "Pennsylvania & New York," connecting the Lehigh Valley railroad at Wilkes-Barre with the Erie at Waverly—one hundred and five miles—was constructed and opened for traffic in

September, 1869. He acted as president of this corporation until January, 1870. Securing the construction of the Ithaca & Athens railroad, and of the extension of the "Southern Central" from Owego to Athens, he completed both works and accomplished the great ambition of his life, living to see a continuous line of railroads, in great part the result of his own labors, extending from the Susquehanna at Wyoming to the great lakes. These were some of his principal undertakings, and are evidences of a boldness, foresight, and confidence in the ability to achieve not often possessed by any one man. Over attention to business and continuous mental exertion finally impaired his health and shattered his constitution; hence for several years previous to his death he was obliged to abstain from great mental exertion. He died suddenly on October 9, 1872, while in conversation with his associates of the Southern Central Directory, at Auburn, N. Y. The wife of C. F. Welles, jun, was Elizabeth, a daughter of Hon. John La Porte, of Bradford county. His father, Bartholomew, one of the French exiles who remained in the land that gave him shelter when his own country rejected him, although after the Restoration he was at liberty to return, was also a noted man in the county. He served as county commissioner of Bradford county in 1819, 1820, and 1821. John La Porte was born in Asylum November 4, 1798, and died August 22, 1862. He was first elected to office in Bradford county in 1822, as county auditor. From 1827 to 1832 inclusive he served his district in the legislature, being speaker of the house during the latter year: was elected to congress in 1832, and re-elected in 1834; was appointed associate judge of the county in 1837 and held the position until 1845, when he was appointed surveyor general of the state by Governor Shunk, and held that position until 1851. Mr. and Mrs. A. H. McClintock have an only child, Andrew Todd McClintock. Mr. McClintock, as from the foregoing will fully appear, has his good fortune to thank for inherited qualities and an unusually liberal education that ought some day to place him in the very front rank of the leading members of the bar. His father has long enjoyed a very large and very lucrative practice, numbering among his regular clients some of the wealthiest citizens and most extensive corporations doing business, or hav-

ing property interests, in the Wyoming Valley. In their behalf he has been, and still is, engaged in hundreds of suits involving large amounts of property and delicate legal interpretations that have taken him to the Supreme Court with greater frequency, perhaps, than any of his brother professionals. Warned by his accumulating years that he can no longer withstand the strain of constant application and labor that have been exacted of him for so long a time, he is gradually withdrawing from active practice, goes no more to court, supreme or local, and does as little even in his office as the circumstances will permit. These changes are all to the advantage of the son, to whom the bulk of the father's practice will naturally fall. Trained under his father, and familiar, therefore, with the interests for which the latter has so long and so successfully cared, Andrew H. McClintock can take hold where the father lets go with a very reasonable certainty that the client-age will lose less by the change than by any the elder McClintock's not having such a son might involve. Like the father, Andrew H. McClintock is a man of massive build, of methodical habits, great powers of endurance, and the capacity of doing much work while not seeming to exert himself. He is a familiar in all the chief walks of general literature, having a marked taste therefor, and, being a ready conversationalist and always well informed as to the topics of the day, is a valuable addition to any social company. He has a taste for historic and scientific studies, and is one of the most active members of the Wyoming Historical and Geological Society, and is one of the trustees of the Osterhout Free Library. He is a democrat in politics, and though without any taste for active campaigning, has, nevertheless, done not a little quiet, but effective, legitimate work for his party. He has every qualification for success in his chosen profession, and as already shown, rare opportunities for making its practice at once lucrative in a pecuniary way, and the basis of a first-class professional reputation.

E. B. Yordy has a few more Court Rules left. They contain the rules of the Common Pleas, Orphans' Court, Quarter Sessions Supreme Court, and Equity.

BOOK NOTICE.

FEDERAL DECISIONS. Cases argued and determined in the Supreme, Circuit, and District Courts of the United States. Arranged by William G. Myer. Vol. VI., pp. 884; Vol. VII., pp. 881. The Gilbert Book Company, St. Louis.

Some weeks ago we called attention in a cursory manner to Vol. VI. of this series. Vol. VII. has now come to hand, and as it contains the index to both books, we enlist a few moments of our patrons' time in an examination of them. They contain, as we have before said, the most important decisions upon constitutional law—that outgrowth of our American system of government—and the cases here collated, interesting as they are because of their subject matter, are made still more interesting by the editor's skill and judgment.

Discussions of the relative powers of the state and federal governments occupy the first two hundred and fifteen pages. Each case presents in the opinion a chapter of the country's history. Thus *United States v. Cathcart*, an indictment for treason in giving aid and comfort to those in rebellion, following Webster's exposition that the constitution is not a compact between the states, but a sovereign law over all, tells of the preliminary conditions which led to the constitution, and fortifies by the later writings of Madison, and by the events under Jackson's administration, the propriety of this construction.

In *Texas v. White*, 37 to 48, the story of the secession of Texas is narrated by Chief Justice Chase.

Mr. Justice Washington, in *Houston v. Moore*, defines the national power over State militia.

In a treatise under the title *ex parte Siebold*, much of which is *aliunde*, Justice Bradley exhausts the powers of the Nation to regulate Congressional elections.

The constitutionality of the charter of the United States Bank, which in the earliest sessions of Congress played so important a role, and which for a long time remained an issue in politics, was sustained by a characteristic opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 134 to 150. Many of the trite sentences which came from that great jurist's pen in this case are to-day the axioms of our polity. "The government of the United

"States is one of enumerated powers; * * though limited it is supreme within its sphere of action; * * the express powers delegated to it, *imply* the ordinary means of executing them—the federal constitution and laws in pursuance thereof are supreme and control State constitutions and laws."

The powers of the States to punish crimes created by Acts of Congress, to issue bills of credit, to limit rights of citizens and many other cognate subjects are in the following pages fully considered and authoritatively settled.

Passing over cases upon *ex post facto* laws and "due process of law," our attention is next drawn to "the privileges and immunities of citizens." Under this title we find arrayed the famous "Slaughter House Cases," in which it was held that the legislature of Louisiana had the power, without infringing the fourteenth amendment, to compel the butchers of New Orleans to land and slaughter all live stock at the stock yards and abattoirs of the Crescent City Live Stock Company. The opinion of the Court, delivered by Mr. Justice Miller, takes up fourteen pages, while Judges Field, Bradley and Swayne each appears as dissenting, and together occupy twenty-eight pages. The story of the adoption the last three amendments is here narrated, and they are construed in the light of their history. What constitutes citizenship of the nation, and of a State, and what legislation may be enacted as mere police regulations, these questions lend peculiar interest to the opinions of all the Judges named, and are treated in the style of the most ardent though judicial controversy.

Then, too, *Bartmeyer v. Iowa* is here found, litigation warm with the life of a present important and growing issue, for it declares that prior to the fourteenth amendment State laws prohibiting the liquor traffic were constitutional, and that amendment does not protect the traffic, though whether the amendment is to be so construed as to render invalid a prohibition law in so far as it affects liquor owned prior to its passage is expressly left open.

Nor is woman suffrage unrepresented, Mrs. Virginia Minor, of Missouri, claiming under the fourteenth amendment the privilege of voting, sued Happersett, the register, for refusing to put her name on the list, and Chief Justice Waite elaborately sustains

Happersett in his perversity. (*Miner v. Happersett*, 375-382.) Immediately following we find *Bradwell v. The State*, in which Mrs. Myra Bradwell, editor of the *Chicago Legal News*, sought to compel the Supreme Court of Illinois to admit her to the bar, but she, too, found that the fourteenth amendment did not confer the right to practice law upon her. The rights of colored men are clearly defined in cases arranged under the title "Equal protection of the Laws," and John Chinaman finds himself not less well intrenched behind the bulwarks of a broad and enlightened jurisprudence. (*In re Parrott*.) The right of Congress to regulate commerce covers three hundred and eighty pages. Among the many cases we can only refer to several of more than passing importance: *Gibbons v. Ogden*, opinion by Chief Justice Marshall, decided in 1824, is frequently cited throughout the volumes before us and is itself fully reported on page 580, Vol. VI. The State of New York had granted to Robert Fulton exclusive privilege to navigate the waters of the State with "boats moved by fire or steam." Gibbons, whose vessels were duly registered in the coasting trade, violated this exclusive privilege. The State courts had sustained Fulton and granted an injunction, and Chief Justice Marshall approaches the decision of the question feeling "a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the Judges must exercise in the examination of the subject that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government." After such an introduction the result arrived at, reversing the State court, is not surprising.

Further on, in *Reading Railroad Company v. Pennsylvania*, the State tax on freight carried out of a State is declared unconstitutional.

Munn v. Illinois, a granger elevator case, at the time when the principle upon which it depends was first enunciated, attracted general attention, and is to-day worth a careful reading by any lawyer who interests himself in the growth of law. Says the court: "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. * * It presents a case for the application of a long known and well estab-

lished principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress."

In Griffin's case the constitutionality of the admission of West Virginia to the Union is supported.

"Impairing the Obligations of Contracts" is an important title. Here we find the Supreme Court of the United States issuing a mandamus against the City of Quincy, compelling it to levy taxes and pay its debts, because a State law, which limited its power of taxation, was, as to existing indebtedness, unconstitutional. (Von Hoffman v. Quincy.)

Dartmouth College v. Woodward, a case too famous to justify special review, is reported fully, presenting the opinions both of Chief Justice Marshall and of Judge Story.

What statutes partake of the nature of contracts is also the special subject of discussion in several cases, while it is incidentally under consideration frequently in the construction of charters. Especially large is the number and variety of contests in which the ultimate purpose of railroads, banks, manufacturing corporations, and occasionally individuals, is to escape taxation on the ground that the State, by a legislative act, has entered into a contract which is about to be impaired.

A very valuable feature of Vol. VII. is to be found under the title "Construction of Statutes." The cases bearing upon the subject are here reduced to digest form and every important rule is stated briefly, and printed so that it readily catches the eye, the syllabi of cases and references being arranged under it.

A subject that would perhaps hardly be looked for in connection with constitutional law, we mean the Law of Nations, is one of the titles of this volume, and receives some, though we are inclined to think inadequate, attention. Taking both volumes together we can only say that Vol. VII. has fully realized the promises made for it. The two books may now be recommended as among the best and most fascinating works on constitutional law that ever come from the press. We have reviewed them thus fully, so that those of our readers who have not yet inspected Myers' Federal Decisions, and who contemplate a purchase of the national reports, may have their curiosity aroused to examine a very deserving work.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, JUNE 5, 1885.

No. 23

Supreme Court of Pennsylvania.

COUNTY OF LUZERNE v. GLENNON.

Classification of counties—Population—Census—Salary of county officers.

1. The rule announced by Rice, P. J., in 1 Kulp, 297, adopted by the Supreme Court, viz: In the absence of express legislative declaration of the fact, or of any other method provided by the legislature for ascertaining it, the last preceding decennial census is to be resorted to as the best evidence of the population of a county in case of classification by population. *Monroe v. Luzerne County*, 7 Out. 281, modified.
2. Each county must remain in the class in which the last census found it until it is transferred to another class by a subsequent census.

For opinion of the court below see 14 Luz. Leg. Reg. 77, 3 Kulp, 248.

Error to the Court of Common Pleas of Luzerne county.

The opinion of the court was delivered May 25, 1885, by

STERRETT, J.—If the case stated contained an unqualified admission or averment of fact that, at the time plaintiff entered on his official duties as recorder of deeds in Luzerne county, the population of the county was over one hundred and fifty thousand, and less than two hundred and fifty thousand, there might be something on which to base a judgment in his favor; but there is no such admission or averment therein. The averment in the second paragraph, "that in 1880, when the last decennial census was taken, the population of Luzerne county was one hundred and thirty-three thousand and sixty-six," is distinct and positive, but the succeeding averment, viz., "and when plaintiff entered on his official duties the population of Luzerne county was over one hundred and fifty thousand, and less than two hundred and fifty thousand, based upon the reasons incorporated in the following paragraph," is obviously a mere in-

ference of fact from the data contained in the third paragraph of the case stated. The inference thus drawn from the facts embodied in that paragraph may possibly be correct, but it is wholly unwarranted. It is, at best, only a method of forming an approximate estimate. The only legally recognized method of determining the population of any particular county, or district, is by resorting to the last preceding decennial census; and, according to that, the population of Luzerne county is less than one hundred and fifty thousand. We do not say it is not competent for the legislature to provide some other or additional mode of determining the fact; but, until some other legal provision is made, we must be governed by the only recognized rule applicable to the subject. In *Luzerne County v. Griffith*, 1 Kulp, 297, this court said: "In the absence of express legislative declaration of the fact, or of any other method provided by the legislature for ascertaining it, the last preceding decennial census is to be resorted to as the best evidence of the population of a county in case of classification of counties by population." In the light of existing legislation, we have no doubt that for the purposes of classification under the various salary acts, each county must remain in the class in which the last census found it until it is transferred to another class by a subsequent census. The United States decennial census is the only official determination of population that we now have; and the inconvenience and injustice that would necessarily arise from accepting any unofficial guide to the classification of counties, for salary purposes, cannot well be overestimated. Legislative and judicial apportionments are both based on population determined by the last preceding census. The constitution provides that "whenever a county shall contain forty thousand inhabitants it shall constitute a separate judicial district;" but in *Com. ex rel. Harding*, 6 Norris, 351, we held that such separate districts can only be formed after a decennial census showing the requisite population. The cases, it is true, are not exactly parallel, but the analogy is very close. The radical error committed by the learned judge of the Common Pleas was in assuming the case stated contained an unqualified admission that the county contained a population of over one hundred and fifty thousand when plaintiff below entered on the duties of his

office. This was a mistake. It contains no such admission. The statement as to population at that date, as we have already noticed, is at best but a mere inference of fact drawn from other facts which are assumed to be true. To sanction such a mode of determining population at any given time, would lead to interminable trouble and confusion. The question as to the manner of ascertaining what the population of a county is, did not arise in *Monroe v. County of Luzerne*, 7 Out. 278. The present chief justice, delivering the opinion of the court in that case, says: "By what mode that population shall be ascertained, does not arise in this case. The agreement of the parties settles several questions relating to the population. We therefore take that agreement as the starting point." The question in that case grew out of the creation of Lackawanna county in 1878, and does not rule the point upon which this case turns. In that case the facts in regard to the population in the respective parts composing the old and the new county, were distinctly stated as they appeared by the census of 1870.

Judgment reversed, and now judgment for defendant below on the case stated.

R. D. Evans, for plaintiff in error.

J. V. Darling and W. S. McLean, *contra*.

A young lawyer friend of mine from Chicago, about to be admitted to the Supreme Court, asked ex-Justice David Davis for his advice in regard to his conduct on the occasion of his first case. The Judge replied "You need not be afraid to speak before the Supreme Court, and if one of those duffers in a toga interrupts you in the midst of an argument by some irrelevant question, don't get frightened and spoil your argument by stopping to answer him. Just say quietly: 'Excuse me, your Honor, but I will reach that by-and-by,' and if you don't reach it, it won't matter. You need not be afraid that you will be called up to answer it after you have taken your seat." The young man took his advice, and gained his case last week.

Supreme Court of Pennsylvania.

SHAINLINE'S APPEAL.

An appeal to the Supreme Court from the decision of the court below upon a case stated does not lie unless such right of appeal is reserved in the case stated.

Appeal from the Common Pleas of Montgomery county in the case of *Adrane Periepi et al. v. Joseph Frankenfield, Sheriff*, awarding the funds in the defendant's hands to *Adrane Periepi et al.*, upon claims for wages as laborers in a stone quarry.

The parties in this action entered into an amicable agreement of reference, which contained the following clause:

"If any party hereto be dissatisfied with the report he shall file exceptions with the said Henry B. Garber, Esq., within ten days as aforesaid, and this agreement, the report, evidence, and all exceptions, shall be then filed in the Prothonotary's office of said county, and be heard and determined by the court upon the evidence taken before the said referee, in like manner as if the same was the report of an auditor distributing money paid into court."

The court below, *BOYER, P. J.*, filed opinion April 7, 1885. Reported in full in *Montgomery county Law Reporter*, Vol. 1, p. 21, from which *J. M. Shainline*, the lessor of the quarry, took this appeal.

The agreement in this case does not provide for a review of the decision of the Court of Common Pleas, and the right thereto was waived in the execution of the same. *Fuller v. Trevor et al.* 8 S. & R. 529. *Wilson et al. v. The Commonwealth*, 3 P. & W. 531, *Hughes' Administrators v. Peaslee*, 14 Wr. 257.

The opinion of the court was filed May 11, 1855.

PER CURIAM.—This arose on an agreement of submission to a referee, without reserving the right to a writ of error or appeal to this court. It is very clear, therefore, this appeal does not lie. The right to file exceptions in the court below gives no right to bring the case here on appeal from its decision.

The appeal is quashed.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, JUNE 12, 1885.

No. 24

Court of Common Pleas of Luzerne County.

CITY OF WILKES-BARRE ?¹. COUNTY OF LUZERNE.

1. The act of April 16, 1870, "providing the manner in which county bridges shall be built in the county of Luzerne," construed, and said act held to apply to bridges across a stream dividing a township from a borough or city.
2. In many cases the word "township" in a statute is used as a general term to cover the several municipal divisions of a county, and where the intent so to use it becomes clear, it should be so construed by the court.

Mandamus.

The opinion of the court was delivered January 17, 1885, by

RICE, P. J.—This case turns on the proper construction of the act of April 16, 1870, P. L. 1199, entitled "an act providing the manner in which county bridges shall be built in the county of Luzerne." The defendant's counsel contends that the words, "across a stream which runs between two townships," should receive a literal construction; while the counsel for the city contends that the plain intention of the act is broad enough to cover the case of a bridge across a stream which runs between a township and a city or borough, and that the act should be so construed. The fund for building county bridges is raised by taxation for the express purpose, throughout the whole county. If, therefore, the latter is not the true construction, then, not only the city of Wilkes-Barre and the numerous boroughs of the county, but also every township which may be separated from any of them by a stream, will be deprived of the benefits of the act—the former wholly and the latter at least in part—notwithstanding both contribute by taxation for the express purpose of creating the fund. Assuming, as is argued, that the

word townships was used because the intention was to relieve the poorer and less populous portions of the county, a manifest failure to accomplish that end will result in every case where a needed bridge will connect the township with a borough or city. We can discover no plausible reason for supposing that, even upon the theory suggested, the legislature intended such discrimination. The fact that the fund is raised by general taxation throughout the whole county is not conclusive, but it, nevertheless, goes very far to show that such a result could not have been intended. But, the defendant's counsel argues, the act in question is a special law, applying only to this county, therefore, it should be construed strictly; and it is suggested that the general law of 1836 governs the case, and the procedure there prescribed must be followed. The reply to this argument is, that if the act of 1870 is to be given the limited effect contended for, so also must the act of 1836; for in the two sections of that act which relate to the question, the word *townships* alone is used. If, therefore, the defendant's construction is to prevail, it follows that the legislature has, either intentionally or by oversight, omitted to provide for a class of cases of not uncommon occurrence, and apparently within the general purpose of the law. If this be so, the defect in the law—for it would then very clearly appear to be one—must remain until the legislature can correct it. The court cannot make the law. These considerations suggest the necessity of more than a superficial examination of the legislation; for here, if anywhere, the rule should apply that statutes are to be construed so as may best effectuate the intention of the makers which, sometimes, may be collected from the cause or occasion of passing the law, and when discovered it ought to be followed with judgment and discretion in the construction, though that construction may seem contrary to the letter." *Big Black Creek Imp. Co. v. Com.*, 13 Nor. 450. In this investigation we are led to inquire, what was the state of the law prior to the act of 1870? Bridges on the boundary or division line of townships were to be built and maintained at the joint and equal expense of the said townships as in the case of public roads. Sec. 34, act June 13, 1836, P. L. 560. But where, upon proper proceedings, it should appear that a bridge was necessary, and

would be too expensive for one, or two, adjoining townships to build the same, then it was to be built at the expense of the county. Sec. 35, *ibid.* The proceedings were by view, subject to the approval of the court, grand jury, and county commissioners. The material change in the law made by the act of 1870 is in the method of procedure, and investing the entire discretion in the grand jury, subject to the approval of the court. We admit that if the general law had mentioned boroughs and cities, or if there were any other legislation covering this particular case, the omission to mention them in the local law would make the argument of the defendant's counsel conclusive. It would then plainly appear that the latter act was intended to except certain cases out of the operation of the general law, and to provide for them specially. But the conditions upon which this argument rests do not exist, as we have already shown. Hence I believe it safe to say that if, when the general law was in force, the duty of building these bridges could have been imposed on the county, it may be under the act of 1870. Being statutes in *pari materio*, they are to be construed together. The former shows the general purpose which the legislature had in view, and the latter regulates the procedure in this county. Taking this whole legislation together, upon what principle does the law direct that the expense of building bridges in proper cases shall be borne by the county? When it is observed that it is a part of the general legislation which was intended to cover the whole subject of public roads, streets, and bridges. We think it becomes evident that its purpose was not to relieve townships, *as such*, from the burden at the expense, and to the exclusion, of other municipal divisions of the county. It is rather because bridges, which are parts of the public highways, are for the benefit of all the inhabitants of the county, as well as of the immediate locality, and where, by reason of the great expense, inequality of burden would result if the latter were compelled to build them, it was thought just that it should be distributed over all the localities to be benefitted. But this general principle, which is the reason of the law, applies as well to a bridge across a stream dividing a township from a borough or city, as to a stream between two townships, and being discovered it ought to control

in the interpretation of the law, unless the strict letter of the act prevents. In the case of Pottsville Borough v. Norwegian Township, 2 H. 543, an action brought by the borough to recover from the township one-half the cost of a bridge built on a public highway over a creek which was the dividing line between the two, was maintained under section 34 of the act of 1836, *supra*. The application of the decision to this case consists in this, that the section cited speaks only of townships; the defense was urged and sustained in the court below that no valid contract was shown which would bind the township; but the judgment was reversed, the court saying, "it is the law which throws the burden on the township of Norwegian, and not the contract of its supervisors, and it must redeem the legal obligation." But it is said the particular question now before the court was not discussed in the case cited. This is true, but it is almost impossible to assume that it was overlooked, for the act was referred to, and quoted from, by the court as the foundation of the plaintiff's action. However this may be, the question, though arising under a different act, was particularly discussed and considered in the case of Road in Milton, 4 Wr. 300. Without reciting the facts of this case at length, the force and applicability of the decision will be seen upon an examination of the act of March 8, 1859, P. L. 111, and the following quotation from the opinion of Chief Justice Lowrie: "We are not impressed by the fact that the Northumberland county road law of 1859 does not mention boroughs and borough officers, but only townships and township officers; and think that, notwithstanding this, it applies also to roads in boroughs. The general law of 1836 has the same omission, and yet it has always been regarded as the road law for boroughs as well as townships; *"this word (the italics are ours) being used as a general term including all municipal divisions relating to roads where no special provision is made."* The case of Street v. Com. 6 W. & S. 209, relating to the power of the county commissioners to fill a vacancy in the office of assessor in a city or borough, although, upon a literal reading of sec. 87 of the act of April 16, 1834, P. L. 553, it might seem to apply to townships only, and the case of Phila. Wards, 41 Leg. Int. 16 (Arnold, J.), relating to the erection of election districts under the act of May 18, 1876, P. L.

178, although the act speaks only of townships, show that the strict letter of the statute is not always allowed to control. It does not follow, nor do we decide, that the county, under the present laws relating to streets wholly within a borough or the city, could be compelled to build a bridge wholly within the same. That question is not before the court, and in deciding it other legislation might have to be considered. Neither does it follow, by any means, that the words township, borough, and city are to be treated as synonymous terms in the construction of statutes. In many cases, however, the word township is used as a general term to cover the several municipal divisions of a county, and where the intent so to use it becomes clear, it should be so construed by the court. Such construction is justified by precedents, as we have shown, and we think it should prevail in this case.

Judgment is entered for the relator, and a peremptory writ of mandamus is awarded.

William S. McLean, for relator.

R. D. Evans, for defendant.

Court of Common Pleas of Schuylkill County.

MOUNTAIN CITY BANKING COMPANY v. MOYER.

- 1 The tender of a check upon plaintiff in payment of a note will not support a claim for setoff, unless the defendant still tenders it at the trial.
- 2 An endorser cannot obtain the check of a depositor in a bank, after the insolvency of the latter, and use it to set off the bank's claim on the note.

Motion for a new trial.

BECHTEL, J.—The above suit was instituted to recover the amount of a promissory note held by the plaintiff, upon which the defendant appears as endorser. The court instructed the jury to find for the plaintiff, allowing the defendant credit for the usury paid to the bank. After the plaintiff had closed its doors

and suspended payment, Joseph Derr, the maker of the note, obtained the check of P. D. Helms for an amount more than sufficient to pay the note, which check was drawn on the plaintiff against the deposit of said Helms. This check was tendered to the plaintiff in payment of the note in suit, and refused. The defendant claims that by this transaction he was relieved from his liability as endorser, and this is the ground of the motion for a new trial. To obtain Helms' check Derr had given to him his promissory note for a like amount. After the plaintiff had refused to accept the check in payment of the note, Derr returned it to Helms, and received back his note. Hence at the time of the trial of the above suit, neither the defendant nor Derr, the maker of the note in suit, could make good the tender, nor offer the check as a setoff to the claim of the plaintiff, as neither was possessed thereof. To entitle the defendant to a verdict in his favor, or to recover costs, he must bring the money tendered into court. *Pennypacker v. Umberger*, 10 Harris, 492; *Wheeler v. Woodward*, 16 Sm. 158; *Cornell v. Green*, 10 S. & R. 14; and *Sherdine v. Gaul*, 2 Dall. 190. The holder of an assigned claim must show that it was assigned to him before suit brought. *Spears v. Sterrett*, 5 Casey, 192; *Stephens v. Gilberton Coal Co.* 1 Leg. Chron. 230. It is just as necessary that he should continue to be the holder or assignee up to, and including, the time of trial, for then it is that he seeks to avail himself of it as a setoff. We think it doubtful whether this check could have been used as a setoff at all under the arrangement with Helms. Derr evidently was not to pay Helms the note he gave, unless he could avail himself of the check as setoff, for he returned the check and got his note as soon as the bank refused the check. In *Kessler v. Angle*, 2 W. N. C. 23, this very question was presented, and the court below declined to admit the setoff. This action was affirmed by the Supreme Court by an equally divided court. We may also refer to the testimony of the present receiver, which shows that the entire deposit of Mr. Helms has been paid on his check since the return of the check of Mr. Derr, hence allowing it here as setoff would be requiring the bank to pay it twice.

Motion overruled, and new trial refused.

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FRIDAY, JUNE 19, 1885.

No. 25

Court of Common Pleas of Luzerne County.

MOORE v. HABEL.

Legacies—Vendor and vendee—Equitable ejectment—Referee—Presumption of payment.

- 1 Where, after giving general pecuniary legacies, the testator blends his real and personal estate in a residuary gift, a charge of the legacies on the real estate is implied.
- 2 The primary fund to pay legacies, whether charged on land or not, is the personal estate, unless special provision is made to the contrary.
- 3 A legacy which has been due and unclaimed and without recognition for twenty years is presumed, *prima facie*, to have been paid.
- 4 After the lapse of twenty-three years the mere allegation that there is not *now* any personal estate of the testator out of which the legacies can be collected, is not sufficiently explicit to warrant a resort to the land.
- 5 The real estate charged with the payment of legacies is liable on a deficiency of assets, but not for misapplication, waste, or insolvency of the executor.
- 6 The power of the court to re-commit the report of a referee upon the allegation of after-discovered evidence is no greater than its discretionary power at common law to grant new trials, and its exercise is to be governed by the same general principles.
- 7 The court has power in an equitable ejectment to modify the conditions of the verdict of a jury as to the report of a referee, in order more effectually to do equity.
- 8 Neither law nor equity will permit a vendee to hold the land and at the same time withhold payment of the purchase money upon the doubtful contingency that the land may at some time be re-vested to for pecuniary legacies which are, *prima facie*, presumed to be paid, provided indemnity is given.
- 9 Though equity will not compel a vendee to take a defective title, it will compel him to take a good title subject to a pecuniary charge against which adequate security has been given.

Exceptions to report of referee.

The opinion of the court was delivered September 10, 1884, by

RICE, P. J.—In determining whether a legacy is chargeable on land in case of a deficiency of personal assets the whole will must be taken together. It may be so charged by implication. No form of words is necessary to produce that effect. Where the intent is manifest it must be carried into effect. Davis's Appeal, 2 Nor. 348, and cases there cited. It has become a rule of construction—so clearly does such testamentary disposition of property manifest the testator's intent—that where, after giving general pecuniary legacies, the testator blends his real and

personal estate in a residuary gift, a charge of the legacies on the real estate is implied. "The residue in such a case can mean nothing but what remains after the legacies have been taken out." *Gallagher's Appeal*, 12 Wr. 121. In the same connection Chief Justice Woodward suggested that, "if there be special devises of real estate, the word residue may refer to them," but we do not understand him as declaring that such special devises would invariably make an exception to the general rule above stated. If, taking the whole will together, the intent to have the legacies paid at all events is manifest, it must control, and where, notwithstanding one special devise, the testator manifestly intends that the general devise blending real and personal estate together shall be subject to certain pecuniary legacies, they are undoubtedly charged on the land. After directing her debts and funeral expenses to be paid, Mary Lytle, the testatrix blended the residue of her estate, real, personal, and mixed, and devised it to Mary D. Morrison for life, with remainders over. By a subsequent codicil she excepted out of this general devise one piece of land and specifically devised it to S. A. D. Moore, and also gave the four pecuniary legacies under consideration, but expressly ratified and confirmed her former will so far as the same was not affected by the codicil. Thus the blending of the realty and personalty for the purposes of the devise was not disturbed; the effect of the codicil was to take the single piece of land and the four pecuniary legacies from the common fund, and to reduce it by so much. In such a case we think the authorities show that the residue does not mean what is left of the personal estate after the legacies are paid, and what is left of the real estate after the one specific devise is taken out, but what is left of the whole blended estate, and is therefore given subject to these pecuniary gifts. *Hassenclever v. Tucker*, 2 Bin. 525; *Tower's Appeal*, 9 W. & S. 105; *Wertz's Appeal*, 19 Sm. 176, and cases cited; *Davis's Appeal*, *supra*, and cases cited; *Greville v. Browne*, 7 H. L. C. 689; 3 Jarm. 430. But assuming, as we think it must be on a fair construction of Mary Lytle's will, that these legacies were charged on the land included in the residuary devise, it is to be observed:

I. That "the primary funds to pay legacies, whether charged on land or not, is the personal estate, unless special provision

be made to the contrary, and the legatee should exhaust the personal estate before proceeding against the real estate." *Breden v. Gilliland*, 17 Sm. 34. To discharge the personal estate "it must appear, not only that the real estate is intended to be charged, but that the personal estate is intended to be exempted." *Eavenson's Appeal*, 3 Nor. 172. (See also *Prince's Estate*, 2 Kulp, 450). It is not contended that an intention to exempt the personal estate is manifested in this will. It was undoubtedly the primary fund out of which to pay the legacies in question.

II. When this case was tried nearly twenty-three years had elapsed since the death of Mary Lytle and the granting of letters of administration, with the will annexed, upon her estate. "A debt" (a legacy), "which has been due and unclaimed and without recognition for twenty years is presumed to have been paid. This presumption, *prima facie*, obliterates the debt, and the *onus* of proof is on the creditor * * * to show that payment of the debt has not been made." *Bentley's Appeal*, 3 Out. 504. This presumption was held not to have been rebutted by proof that the executor had died within twenty years, nor by proof that he had said to a third person that he would not pay the legacy because the legatee was rich enough without it. (See also *Summerville v. Halliday*, 1 W. 507). Now, on the trial before the referee, there was no evidence whatever of a deficiency of personal assets or to rebut the presumption of payment. Hence his conclusion that the defendant had failed to show defect in the plaintiff's title which would defeat this action, brought to enforce specific performance of a contract for the sale of the land, was perfectly justified, at least, so far as these legacies are concerned.

The defendant evidently concluding that the referee's finding, so far as it related to the charge of these legacies, could not be successfully assailed without more evidence, made a motion on the argument of these exceptions to have the case referred back, "that he may have such further hearing of the case as to justly and equitably secure the defendant from the claims of the said legatees." The affidavit upon which the motion is based alleges substantially: 1st, that the land in controversy was the entire landed estate of Mary Lytle; 2d, that there is no other

estate of the said Mary Lytle, real or personal, out of which the said legacies can now be collected; 3d, that since the trial he has discovered that the land is liable for the payment of the said legacies; 4th, that the same have never been paid out of the estate of Mary Lytle; 5th, that the administrator of one of the legatees now threatens to enforce payment of her legacy out of the land. This is accompanied by an affidavit of the administrator of the said legatee that an application was made and order granted for the sale of the land, in May, 1877, in order to pay said legacies, which was stayed in June, 1878, because prematurely made. Two objections to the motion based on these affidavits suggest themselves: After a lapse of twenty-three years the mere allegation that there is not *now* any personal estate of the testatrix out of which the legacies can be collected, does not seem to us sufficiently explicit to warrant a resort to the land. For all that this allegation contains there may have been assets enough, and the same have been wasted or misapplied. In that case the real estate would be discharged. "The executor is a trustee for the legatees, and it is their duty to see that he makes a proper application of the funds collected by him for their benefit. If the assets are wasted or misapplied the loss falls on the legatees. The real estate charged is liable on a deficiency of assets, but not for misapplication, waste, or insolvency of the executor." *Murdock's Appeal*, 7 C. 47; *Kohler's Appeal*, 3 Gr. 143. (See also *Blackman Estate*, 2 Kulp, 162). It may be possible that we have taken too critical a view of the affidavit, and we therefore pass to the second objection, which is more serious. The act of June 22, 1871, reserves to the court "the power of committing the report again to the referee should justice require it." P. L. 1363. The power here given, so far as it relates to matters not affecting the correctness of the referee's conclusions on the evidence and pleadings before him (as, for example, after-discovered evidence), is certainly no greater than the discretionary power of the court at common law to grant new trials, and we see no substantial reason in this case why its exercise should not be governed by the same general principles. None of the evidence contained in the affidavit upon which this motion is based can, in a strict legal sense, be called after-dis-

covered. The facts were known, or ought to have been known, to the defendant at the trial. The will was offered by him, and these alleged charges and incumbrances appeared therein. By the exercise of due diligence he would have discovered whether they had been paid. According to the fundamental rules relating to after-discovered evidence, the defendant would not be entitled to demand a new trial, and for the same reason we hold that, if there is no other cause for re-committing the report, he is not entitled to have it sent back. Further, it is not necessary in order to protect the defendant against the alleged charge of these legacies. If the report were referred back, the most that the defendant could equitably ask, so far as they are concerned, would be to have such conditions annexed to the finding and judgment against him as would effect that object. But this is within the power of the court without setting aside the present report. The power of the court in an equitable ejectment to modify the conditions of the verdict in order more effectually to do equity, is recognized in a large number of cases. *Creigh v. Shatto*, 9 W. & S. 82; *Miles v. Williamson*, 12 H. 135; *Harmar v. Holton*, 1 C. 249; *Henry v. Raiman*, 1 C. 354-361; *Pendleton v. Richey*, 8 C. 58; *Webster v. Webster*, 3 Sm. 161; *Napier v. Darlington*, 20 Sm. 64; *Gordonier v. Billings*, 27 Sm. 503; *Bower v. Fenn*, 9 Nor. 362; *Kensinger v. Smith*, 13 Nor. 384; *Conolly v. Miller*, 14 Nor. 513. The last cited case shows how extensive is the control which the court may exercise. Mr. Justice Mercur, in summing up the authorities, says: "We have thus shown that the court has power in a proper case to extend the time of payment, and to supply just and reasonable conditions omitted in the verdict. It is a power to be exercised with care and only when equity demands it for the protection of the party required to pay the money." Neither law nor equity will permit the defendant to hold the land and at the same time withhold payment of the purchase money upon the doubtful contingency that the land may at some time be resorted to for these pecuniary legacies which are *prima facie* presumed to be paid. *Lauer v. Lee*, 6 Wr. 165-171. But it is, perhaps, not unreasonable that he should ask to be indemnified against them, for whether they have been paid and the land discharged cannot be conclusively determined until the legatees have had their day in court.

On the argument the plaintiff made an offer, as we understood the counsel, to furnish such indemnity. In view of all the circumstances this is all the defendant would be entitled to ask, for, "though equity will not compel a vendee to take a *defective* title, it will compel him to take a *good* title subject to a *pecuniary* charge, against which adequate security has been given." *Thompson v. Carpenter*, 4 Barr. 132. (See also *Keyes's Appeal*, 15 Sm. 196.) This discussion would be unnecessary if Mary Lytle's title to, and consequent right to charge the land with the payment of these legacies, was not proved. But is the conclusion of the learned referee, that the will and codicil were not competent evidence, correct? It would be did not the evidence show that the plaintiff's title came from the same source. But after the defendant had put in evidence the will and codicil, the plaintiff proved her title. This was shown to rest on a direct devise to her of sixty-four acres of the land, and a deed for the residue from the assignee in bankruptcy of James S. Lytle, the residuary devisee, in whom the same had vested by reason of the facts, as shown by the parol evidence, that Mary D. Morrison had survived John D. Lytle and had died without issue. Hence, while the referee's conclusion that the defendant had failed to prove such defect in the plaintiff's title as would prevent a recovery is correct, we cannot wholly assent to the reason given. But inasmuch as the evidence of the facts above stated upon which her title rests is uncontradicted and precludes, a finding that there is any outstanding title in John D. Lytle, or in any other person, and, as the defendant expressly admits in his affidavit that the title to the whole of the land devised by Mary Lytle had become vested in the plaintiff, it is not necessary to send the case back for more specific findings. The only question then is as to the charge of these legacies, and we have shown that the defendant can be adequately protected against them by a condition annexed to the judgment requiring the plaintiff to indemnify him against them.

The exceptions are overruled, and judgment is entered on the report of the referee in favor of the plaintiff for the land described in the writ, to be released, however, upon the following conditions, viz.: That the said defendant, within forty-five days from this date, pay to the plaintiff the sum of two thousand dollars,

with interest thereon from September 1, 1884, and the costs of suit, and that within sixty days from this date he pays to the plaintiff, or into court for her use, the further sum of twelve hundred and fifty-one dollars and fifts-two cents, with interest thereon from September 1, 1884 (being the residue of the purchase money); upon payment of said sums as aforesaid the deed for the land deposited with the referee to be delivered to the defendant; the said last mentioned sum, if paid into court, to remain in court, and not to be paid out to the plaintiff until the latter shall file a bond to the defendant in the sum of fifteen hundred dollars, with two sufficient sureties to be approved by the court, conditioned to indemnify and save harmless the said defendant against the claims of Thomas, Robert, Mary L., and Sarah Morrison, or either of them, as legatees under the will of Mary Lytle, deceased, and against and from all costs and expenses on account thereof; the said bond to be filed on or before December 1, 1884.

Court of Common Pleas of Luzerne County.

IN RE ASSIGNMENT OF JOHN TREFFEISON.

1. Admissions made in the course of judicial proceedings which have been held to be conclusive against the party, seem, for the most part, to be those on the faith of which a court has been led to adopt a particular course of proceeding, or on which another person has been induced to alter his condition.
2. Payments upon building association stock are not *ipso facto* payments upon the judgment debt or loan. In order to effectuate such application an election by some party entitled to make it is required.

Exceptions to supplemental auditor's report.

The opinion of the court was delivered June 8, 1885, by

RICE, P. J.—Paragraph nineteen of the bill in equity filed by the L. B. & S. Asso. *v.* The People's Savings Bank, contained the following averment: "That upon judgments numbered 305 February term, 1874, 1036 April term, 1874, and 435 October term, 1875, there is now due the plaintiff, in the aggregate, only some six hundred dollars." It is argued that the building association is thereby estopped from claiming out of the present fund more than six hundred dollars, in the aggregate, upon the judgments named. We cannot concur with the learned counsel for the exceptants in this proposition. Neither the defendants in those judgments, nor a subsequent lien creditor, although a party

to the bill, could plead the decree in the equity suit referred as an estoppel in the present proceedings, for, owing to the state of the pleadings in that case, the court did not, and could not, make an adjudication either upon the validity and priority of lien of those judgments, or the amounts due upon them. As an admission the averment referred to was competent evidence in the present proceedings, but it was not conclusive. Admissions made in the course of judicial proceedings which have been held to be conclusive against the party, seem, for the most part, to be those on the faith of which a court has been led to adopt a particular course of proceeding, or on which another person has been induced to alter his condition. It will be seen, upon an examination of the bill referred to, that the averment now under consideration was not essential to a decision of the subject matter of controversy in that suit, and we fail to see how it could have affected the decision in any way. Neither does it appear to us that the defendants in that suit were induced by the averment to alter their condition. It was a statement as to a collateral matter not essential to the adjudication of the questions involved in the controversy; and further than that, it did not purport to be a precise statement of the amount due upon the judgments, nor of the basis upon which that amount should be computed. Hence we conclude that the auditor was not bound to accept it as binding upon him, when an exact compensation showed that a larger amount was due. Payments upon stock are not *ipso facto* payments upon the judgment debt or loan. In order to effectuate such application an election by some party entitled to make it is required. Conceding, for the purposes of the present discussion, that this election may be made by the association, we fail to find the evidence that it was made; and we are not authorized to overturn the auditor's conclusion upon this question of fact, unless very clearly satisfied that he has made a mistake.

The exceptions to the auditor's supplemental report are overruled, and same day it appearing to the court that the request for an issue filed by J. B. and J. H. Mosier has been abandoned, the same is dismissed; and it is ordered that the fund awarded conditionally to them be paid to the next lien creditor, to-wit, the People's Savings Bank of Pittston, and thus modified, the supplemental auditor's report is confirmed absolutely.

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FRIDAY, JUNE 26, 1885.

NO. 26

Court of Common Pleas of Luzerne County.

DEVISEES OF A. C. LANNING, DECEASED, *v.* THOMAS G. DAVIES.

1. Where a vendee under articles of agreement for the sale of land confesses judgment in an amicable action of ejectment, at the same time agreeing that the affidavit of the plaintiff filed therewith shall be sufficient evidence of default in payment of the installments, and shall entitle him to issue a writ of *habere facias* at once, the writ may issue without leave of court.
2. Where judgment is entered on a confession more than ten years old contained in an amicable action of ejectment, leave of court, based on affidavit, must be obtained as required in Rule XVIII., otherwise the judgment will be stricken off.

Rule to set aside writ of habere facias.

Rule to strike off judgment.

The opinion of the court was delivered September 15, 1884, by

RICE, P. J.—I. Was it necessary to obtain leave of court to issue the writ of *habere facias*? We think not. The cases relied on by the defendant's counsel all relate to conditional verdicts where the plaintiff's right to the writ depends upon satisfactory proof to the court that the terms of the verdict have not been complied with. They do not apply here; for surely the parties to an amicable confession of judgment may prescribe the terms upon which an execution can issue, and where they do so their agreement will control. Hence, where a vendee under articles of agreement for the sale of land enters into an amicable action of ejectment, and confesses judgment therein, at the same time agreeing that the affidavit of the plaintiff filed therewith shall be sufficient evidence of default in payment of the installments, and shall entitle the plaintiff to issue a writ of *habere facias* at once,

the *judgment* is absolute and not conditional. True, there is a condition precedent to the issuing of the writ to enforce it, but, by the agreement of the parties, that is fulfilled by filing the required affidavit; the plaintiff is then entitled to the writ as a matter of course. No argument can be drawn from the possible hardships of such a course of procedure. For, first, the defendant agreed to it; and second, the court has ample power, upon a proper showing, to grant him equitable relief, as in other cases of confessed judgments. There is, however, no evidence before us to warrant interference upon that ground in this case.

II. Was judgment irregularly entered, the confession being more than ten years old, and leave of court not having been obtained? "If a warrant of attorney, confession of judgment, or written power to enter and confess judgment, be above ten and under twenty years old, the court in term time, or a judge in vacation, must be moved for leave to enter judgment, which motion must be founded upon an affidavit of the due execution of the warrant, confession of judgment, or written power, and that the money is unpaid, and the parties living." Rule XVIII., sec. 3. At first glance the clause which provides for proof by affidavit that the money is unpaid seems to give some color to the claim that the rule applies to money judgments only. But this is only one of the requirements, and when we search for the reason of the rule, we can discover none for requiring proof by affidavit of the *due execution of the confession* in such cases, which does not apply with equal force to a confession of judgment in ejectment accompanying a contract for the sale of land. The language of the rule is unambiguous, and includes "all confessions." Its plain meaning accords with the reason and spirit of the rule, so far as we are able to discover them. This being so, we are convinced that the case is within the rule. It is a much safer construction to hold that the affidavit, upon which the leave of court is based, may be modified as to one of the several prescribed averments, if the nature of the case requires it, than to declare, against its plain terms, that the rule does not apply at all.

The rules are made absolute.

D. S. Bennet and E. P. Darling, for plaintiffs.

Thomas H. Atherton and Q. A. Gates, for defendants.

Court of Common Pleas of Luzerne County.

MILLER *et al.* *v.* MCCOOL *et al.*

1. Where, upon a rule to dissolve an attachment issued under the act of 1869, the defendants, although called by the plaintiffs, testified voluntarily, their counsel being present at the first hearing and making no objection—*Held*, that their testimony was not incompetent, and should not be stricken out.
2. What is sufficient evidence that the defendants have disposed of their property with intent to defraud their creditors, and to sustain an attachment under the act of 1869, considered.

Rules to dissolve attachments issued under the act of 1869.

The opinion of the court was delivered June 8, 1885, by

RICE, P. J.—The writs are not before us, but as we understand these cases from an examination of such papers as have been furnished to us, the attachments were laid prior to the sheriff's sale on the Sharp execution. If this be so, the only question which we have to decide is, whether there is sufficient evidence of a fraudulent disposition of their property by the defendants prior to that time, not whether the attachment or the execution is entitled to priority in the distribution of the fund. We should, perhaps, explain these remarks by saying, that while there is some evidence that the Sharp judgment was given for the individual debt of one of the defendant partners, there is no evidence that it was fraudulent. Is there sufficient evidence that the defendants have disposed of their property with intent to defraud their creditors? We think there is sufficient evidence from which that inference can be fairly drawn. The facts that they were considerably in debt, that two or three weeks before the sheriff's sale they had a stock of goods in their store worth about three thousand dollars, that their average monthly sales did not exceed one hundred and twenty-five dollars, and that the stock of goods when levied on was reduced in value to four hundred dollars, called for explanation which no one would be so well able to give as the defendants. The answers which one of

the partners gave when questioned regarding the matter, were not such as to weaken the inference which would naturally flow from these unexplained facts. But, in addition, both defendants were called as witnesses, and neither partner undertakes to explain the circumstances, except by statements which, to say the least, convey a very strong intimation that the act alleged as the foundation for the attachment had been committed by his co-partner. We cannot agree with the learned counsel for the defendants, that the testimony given by them was incompetent. The case of *Hortsman v. Kaufman*, 1 Out. 147, does not sustain the position taken. That case simply decided that the act of June 11, 1879, P. L. 129, was unconstitutional because it proposed on its face to force the debtor to forego a constitutional right with which the legislature has no power to interfere; in other words, to compel him to submit to an examination which might criminate himself. Here there was no compulsion, and the power of the court to compel a defendant to testify at the instance of the plaintiff in a proceeding under the act of 1869, is not involved. So far as appears the defendants, although called by the plaintiffs, testified voluntarily. They made no objection to being sworn, nor to answering any of the questions propounded, and we may fairly presume that they were apprised of their rights and privileges, for, at the first hearing, when McCool was examined, their counsel was present and cross-examined. Having given their testimony under such circumstances, we cannot think that any constitutional right was violated, or that any rule or policy of law requires us to strike it out. 1 Green. Ev. §451.

The rules are discharged.

George H. Troutman, for plaintiffs.

John T. Lenahan, for defendants.

E. B. Yordy has a few more Court Rules left. They contain the rules of the Common Pleas, Orphans' Court, Quarter Sessions Supreme Court, and Equity.

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FRIDAY, JULY 3, 1885.

No. 27

Court of Common Pleas of Luzerne County.

JACOB FALK TO THE USE OF E. V. JACKSON *v.* B. WURZBURGER.

Foreign attachment—Practice.

1. A return to a writ of foreign attachment which does not show that the person summoned as garnishee (in case of attachment of real estate) was a tenant in possession *holding under the defendant* is fatally defective.
2. Where the return to a writ of foreign attachment shows a defective service, the proper practice is to move to set aside the "return," or the "service," or the "return and service," and not to move for a dissolution of the attachment.
3. On a rule to show cause of action, counter affidavits cannot be read; nor can the plaintiff be cross-examined; nor, if his affidavit is insufficient, will supplementary affidavits be received.

Rule to show cause why attachment shall not be dissolved.

The opinion of the court was delivered March 6, 1881, by

RICE, P. J.—Two reasons are urged for the dissolution of this attachment: First, that the return to the writ shows improper service; second, that the plaintiff has no cause sufficient to sustain this action. The return is as follows: "Levied and attached the within described real estate as per schedule attached to this writ, etc., and at same time summoned Richard Prencis *et al., terre tenants in possession as garnishees*, by producing to them this writ," etc., etc. This rule was obtained in due time, and subsequently the plaintiff was ordered to file affidavit of cause of action, otherwise rule to be made absolute. Thereupon the plaintiff filed his affidavit, after which, upon a rule to take depositions, the defendant's counsel called the plaintiff for cross-examination, and now asks to have the deposition read and considered in connection with the plaintiff's affidavit of cause of action.

I. The method of service required by the statute is by leaving "a copy of the writ with the *tenant, or other person in actual possession, holding under the defendant* in the attachment." Foreign attachment is a proceeding devised for the purpose, in the

first instance, of compelling a foreign debtor to appear, although eventually his property may be made liable to the amount of the plaintiff's claim. It is a severe remedy, and the service of the writ must, therefore, strictly follow the mode prescribed by the statute. The return, in order to give the court jurisdiction of the defendant's person and property, must leave no essential element of service to implication. The return and service are insufficient in that it does not appear that the persons summoned as garnishee were tenants in possession, *holding under the defendant*. This is more than an irregularity, it is a fatal defect in the service, which must prevent the court from going a single step further. *Hays v. Gillispie*, 11 C. 155; *Lambert v. Challis*, *ibid*. In *Sterrett v. Howarth*, 26 Sm. 438, it was held that the proceedings could not be attacked collaterally, but that the court would quash or set the attachment aside in case of defective service and return, where the same were directly attacked. In the case of *Bryan v. Trout*, 7 W. N. C. 402, there was a defective return, judgment was taken by default process issued thereon, and the land was sold and deed acknowledged, after which the defendant took a writ of error, and the judgment was reversed. The court said, "Neither the person of the defendant nor his property was before the court by the return of the sheriff, and the entry of judgment against him for want of an appearance was erroneous." These cases are decisive. But, it is argued, mere defective service of writ is not ground for dissolving the attachment. Perhaps it was not strictly accurate to move to *dissolve* the attachment. It must be confessed that our practice tends to great liberality in the matter of forms, but we are firmly of the opinion that a proper regard to established forms tends rather to the rapid and intelligent despatch of the business of the courts than does great laxity. We can travel a well-known and well-worn path to a desired point with greater ease and confidence than an unexplored one. This objection has more in it, probably, than a mere technicality. Considering the writ as process to compel appearance, the practice in cases of defective service is analogous to that in case of defective service of summons. Mr. Brightly, in his new edition of Troubal and Haly's Practice, §261, says: "If the mode of service be irregular the proper form of the rule is, 'why the *return* should not be set aside,' not the *service*, the ser-

vice is an act *in pais*, it is with the record only that we have to do." This language is taken from the opinion of the district court of Philadelphia, in *Patton v. Ins. Co.* 1 Phila. 396. That case, however, was not predicated on an irregular or defective return, but upon an irregular service which was sought to be shown by parol testimony. An examination of a large number of cases has led us to the conclusion that where the *service*, as shown by the *return*, is irregular and defective, the rule may be either to set aside the return or the service. Each of these rules is sanctioned by authority. I am speaking now of cases where the *return* is irregular. In *Weaver v. Springer*, 2 M. 42, the rule to set aside the *service* was made absolute. In *Klechner v. Lehigh Co.* 6 Wh. 67, the rule was the same, the case went to the Supreme Court, where the judgment was reversed, upon the ground that the *return* was sufficient, and that "the court erred in setting aside the service by the introduction of *extraneous proofs*." In the case of *Bujac v. Morgan*, 3 Y. 258, the rule was to set aside the *service*. In the case of *Winrow v. Raymond*, 4 Barr. 501, Rogers, J., discusses the practice and cites the foregoing cases as authorities. He declares the practice on the authority of those cases to have always been to set aside the *sheriff's return*. It is apparent from other portions of the opinion that he uses the terms *return* and *service* interchangeably, for he says, "But the court will not set aside the *writ* on motion, for this may do great wrong to the plaintiff, who may, in that event be barred by the act of limitations. It remains to *inquire into the legality of the service*." Upon an examination of the return he declared the service illegal, and set the return aside. In the case of *Ferris v. Trine*, 2 Luz. Leg. Reg. 172, the rule was to *quash* an attachment. Judge Dana said, "Defect or irregularity of service, even taken advantage of in time, does not usually avail to *quash* the writ. The defective *service* may be stricken off." The reasons for the observance of the distinction between dissolving the attachment and setting aside the service when the return shows it to be defective, do not affect the defendant. For, whether the return or service be set aside, in either case he is relieved from the necessity of appearing, and his property is relieved from the attachment. It can only be bound where the service is in the mode directed by the act. The plaintiff's rights,

however, where he has not caused, and is not responsible for, the defect in service, in another direction, might be prejudiced by a mere dissolution of the attachment, for that would leave the return and service to stand, which might prevent him from issuing an alias writ, etc., etc. (See *Winrow v. Raymond*, 4 Barr. 501.) If, therefore, this were the only question in the case, the defect being apparent on the face of the return, the rule strictly should have been, "to show cause why the return," or "service," or "return and service, shall not be set aside." There would be no difficulty, however, in treating the rule as amended and making the proper order.

II. The order to file an affidavit of cause of action was equivalent to a rule to the same effect, and we shall so treat it. The ordinary practice on rules to show cause of action, is for the plaintiff to read his affidavit, and if that is sufficient the attachment will be allowed to stand. Counter affidavits tending to contradict the plaintiff's ought not to be read on the hearing of such a rule, for the reason that it would tend in practice to a trial of the case by the court in advance. Neither, if the affidavit be insufficient, will supplementary affidavits be received. *Eldridge v. Robinson*, 4 S. & R. 548. It has always been the understanding that upon a rule to show cause of action, if the affidavit be sufficient, the defendant cannot cross-examine the plaintiff—1 *Bright. T. & H.* 307—and that, we think, is the proper practice. For, if it be permitted in one case it must be in all, and there is hardly any plaintiff so astute that he cannot be confused by a skillful cross-examiner, and inasmuch as he will not be permitted to clear up this confusion by a supplementary affidavit he might unjustly be thrown out of court. The case of *Lindsley v. Malone* was cited to us as authority, but, upon examination, it will be seen that that was a motion to quash the writ because irregularly issued against a resident, and if authority at all in this case, it is authority for taking depositions, not only of the plaintiff, but of other witnesses, which is clearly not allowed on rule to show cause of action. Our conclusion is, that the taking of the plaintiff's deposition in this case was irregular.

For the reasons given in the consideration of the first point the return and service are set aside.

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FRIDAY, JULY 10, 1885.

No. 28

Court of Common Pleas of Luzerne County.

MONTANYE v. HUSTED *et al.*

Attachment execution—Rule on garnishee—Judgment, opening of.

1. The court may prescribe, by standing order, that a rule on a garnishee to answer interrogatories, may issue as matter of course on filing *præcipe* therefor in the prothonotary's office.
2. In strict practice the rule should expressly state the time when, and the place where, the answers shall be presented.
3. While courts are extremely liberal in opening judgments by default against garnishees, still, where there has been gross neglect, there should be evidence sufficient to satisfy the court that upon the trial no recovery ought to be had against the garnishee, or that the debt attached is not presently demandable.
4. The fact that the debt attached is not presently demandable will not prevent judgment against the garnishee, but the judgment should be moulded to conform to the terms of payment.
5. In a proper case the court may control the execution, even after judgment, so as to prevent enforcement of the debt attached until it is demandable.

Rule to show cause why judgment against the garnishees shall not be opened and they be allowed to answer the interrogatories.

The opinion of the court was delivered June 8, 1885, by

RICE, P. J.—The rule on the garnishee to answer interrogatories in attachment execution proceedings is of right, not of discretion, hence the motion for the same need not be made in open court, but the court may prescribe, by standing order, that on filing the *præcipe* for the rule in the prothonotary's office, it shall issue as of course. *Dougherty v. Thayer*, 28 Sm. 172. In strict practice the rule should expressly state the place where the answers are to be presented, but where the rule shows on its face that it issued from the office of the prothonotary, and com-

mands the garnishee to appear and answer on or before a certain day, we are of opinion that it contains sufficient notice of the time and place when and where the answers are to be presented, to sustain a judgment against the garnishee by default. The record shows that the garnishee was duly served with the *scire facias*, also with a copy of the interrogatories and rule. He did not appear nor answer, and consequently judgment was entered by default. Two months afterwards he made the present application to open the judgment, alleging as excuse for his default that he was ignorant of the nature of the process and of his duty in the premises, and also that he was advised by his neighbors, in whom he had confidence, that his rights could not be prejudiced, and that it was unnecessary for him to appear. We deem it our duty to say that the allegations contained in the *ex parte* affidavit upon which this rule was obtained are, in the main, refuted by the great weight of the testimony. The proof is overwhelming that he was repeatedly advised and warned that it was his duty, and necessary to his own protection, to appear. Notwithstanding the exceptionally ample notice which he had, he deliberately and perversely chose to take the chances of disobeying the command of the process which had been duly served upon him. Now, while it is true that the courts are extremely liberal in opening judgments by default, especially against garnishees, still where the neglect is so gross as in this case, a judgment will not be opened or modified without the most satisfactory proof upon the merits. The evidence should be so clear as to satisfy the court that upon the trial no recovery ought to be had against the garnishee, or that the debt attached is not presently demandable. What are the equities which the garnishee sets up? The debt attached is secured by a mortgage given by him and his wife to Jonathan Husted, one of the defendants. The amount of the mortgage was originally one thousand three hundred dollars, and two hundred dollars have been paid upon it. It is alleged that the mortgage has been assigned. The only proof of an assignment is the parol testimony of Mr. Husted that he assigned it to his wife in June, 1884, for the consideration of twenty dollars. The assignment has not been recorded, and according to the testimony of the garnishee, he had no notice of

it until long after the judgment had been taken against him. According to the testimony of Mr. Husted, the assignment was made on a date shortly after the date of the judgment upon which this attachment issued, and it does not appear that he was then, or is now, the owner of other property sufficient to satisfy his debts. It is true the garnishee says that at an earlier date than the present judgment he received notice that the mortgage had been assigned to one Hartman; but this can amount to nothing, for the reason that the evidence shows that no such assignment was made. It is sufficient to say, without discussion of the evidence further, that, upon the facts presented, the garnishee has no reasonable ground for fear of a double recovery. The second reason urged by the garnishee in support of the rule is, that the debt attached is not presently demandable. It is a fact that the mortgage is payable in annual installments of one hundred dollars each, and that no installment will be due until April 1, 1886. This fact would not prevent judgment against the garnishee, but if it had been made known before judgment was entered, the judgment would have been so moulded as to conform to the terms of payment contained in the obligation by which the debt attached is secured. We are of opinion also that the control which the court, in the exercise of its equity powers, has over its execution process, is such that it is not too late, even now, to make such order as will prevent the enforcement of payment of the debt attached until it is demandable. (See *Irwin v. Lumberman's Bank*, 2 W. & S. 210; *Irwin v. Shoemaker*, 8 W. & S. 75; *Kase v. Kase*, 10 C. 128; *Farmers' etc. Bank v. Little*, 8 W. & S. 219; *Woodward v. Carson*, 5 Nor. 176; *Thomas v. Hendricks*, 2 Kulp, 152).

It is ordered that the rule be discharged, upon condition, however, that the plaintiff, within ten days from this date, files in the prothonotary's office a stipulation that executions shall not be issued on the above judgment against the garnishees, except for the amounts of, and at or after the dates when, the several installments of the mortgage from the garnishees to Jonathan Husted, recorded in Luzerne county in mortgage book No. 45, page 308, etc., shall fall due, to-wit, on the first day of April, 1886, and annually thereafter, and in case the plaintiff refuses or

neglects to file such stipulation, it is ordered that the rule be made absolute.

W. C. Price, Esq., for rule.

T. R. Martin, Esq., *contra*.

Court of Common Pleas of Luzerne County.

WATSON *et al.* v. TIMLIN.

1. Upon *certiorari* a record will not be reversed for a false return of service, unless the falsity be made to appear very clearly by depositions.
2. The return under oath need not be by affidavit on the back of the summons.

Certiorari.

The opinion of the court was delivered June 8, 1885, by

RICE, P. J.—First exception: Whether upon *certiorari* it is competent in any case for the defendant to contradict the return of the constable by extraneous evidence that he was not served with summons, and, therefore, had no notice of the action, is a question not necessary now to discuss. It is enough to say, that for a false return the defendant has his remedy by action, and, therefore, it is very certain that the court will not overturn the judgment upon such evidence, unless the falsity of the return be made to appear very clearly. This fact does not satisfactorily appear in these depositions. On the contrary, the weight of the testimony, especially as the *prima facie* presumption is in favor of the return, is the other way.

Second, third, and sixth exceptions: We think these exceptions are sufficiently answered by the following quotation from the transcript: "After examining claim and hearing plaintiff's proofs and allegations, judgment is publicly, at hour last above named, entered against defendant," etc.

Fifth exception: The record shows that the return was made on oath; it is not necessary that the affidavit shall be on the back of the summons.

The exceptions are overruled and judgment affirmed.

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No. 29

Supreme Court of Pennsylvania.

SCRANTON'S APPEAL.

Insolvency—Discharge—Libel—Act of June 16, 1836.

A person arrested under a *capias ad satisfaciendum*, and applying for a discharge under the insolvent laws, is not entitled to such discharge unless he has undergone an actual confinement of at least sixty days. The fact that such party has been convicted on a criminal charge for the same offense as that upon which the judgment on which the *capias* has issued was founded, and has been imprisoned under sentence in such case for a less term than sixty days, does not entitle him to a discharge.

Appeal of William W. Scranton, from a decree of the Common Pleas of Lackawanna county, directing the discharge of Aaron A. Chase, an insolvent debtor.

The following facts appeared at the hearing of the motion to discharge: On June 14, 1882, William W. Scranton recovered a judgment against Aaron A. Chase in the Common Pleas of Luzerne county, in the sum of \$1,441.50 as damages for a libel published by the latter as to the former. This judgment was subsequently affirmed by the Supreme Court. On September 13, 1882, a writ of *testatum fieri facias*, with clause of *capias ad satisfaciendum*, was issued from the Common Pleas of Luzerne county on the above judgment, directed to the sheriff of Lackawanna county, on which Chase was taken into custody, whereupon he gave a bond to appear at court and comply with the insolvent laws of the commonwealth. He was then released and the sheriff so returned the writ. On October 20, 1882, he filed his petition in the Common Pleas of Lackawanna county as an insolvent debtor. He subsequently made an assignment of his estate,

and on January 8, 1883, moved for his discharge. On a criminal conviction for the same libel he had been sentenced to jail for thirty days, but he had at no time undergone the imprisonment for sixty days prescribed by the 17th section of the act of June 16, 1836, P. L. 734, P. Dig. 780). On December 10, 1884, the court, Handley, P. J., filed the following opinion: "We have held this case well in hand for the purpose of allowing the plaintiff a full opportunity of collecting his judgment debt out of the property surrendered by the defendant to the assignee. But up to the present time nothing has been done in that direction. It is objected that the defendant cannot be discharged under the insolvent laws, because the assignment is void, and because the defendant has not been in prison for the period required by law. The defendant has been in prison for this same cause of action, and hence, as we understand the law, cannot be imprisoned again. We believe the assignment made by the insolvent is valid, and that under all the evidence he is entitled to his discharge. We, therefore, allow this motion, and direct counsel to frame decree and present the same to the court for approval." Scranton thereupon took this writ, assigning for error the discharge of the debtor by the court.

W. H. McCartney, for appellant.

The act of June 16, 1836, sec. 17, P. D. 780, provides that "if the petitioner shall be in custody or confinement at the time of such order, by virtue of process issued upon any judgment obtained against him in an action * * * for a libel * * * where the damages found by the jury shall exceed the sum of one hundred dollars * * * he shall not be entitled to be discharged from such imprisonment or arrest, until he shall have been in actual confinement during a term of at least sixty days." It has been decided that the effect of this is that, though a petitioner in such a case is entitled to discharge from custody without undergoing imprisonment on giving a bond, yet on final hearing he will not be discharged until he has been in actual confinement during a term of sixty days. *Com. v. Jailer of Allegheny*, 6 Barr, 445; *McDonough's Case*, 1 Wr. 275; *ex parte Blumer*, 5 Nor. 371; *Paxson's Case*, 1 Chester County Reports, 482. The fact that he was sentenced to jail for thirty days has

no bearing on the matter, as a criminal conviction in one court cannot relieve the party convicted from legal obligations in another.

David C. Harrington, for appellee.

Article 1, sec. 16, of the constitution, provides that "the person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law." The 17th section of the act of June 17, 1836, is therefore unconstitutional and void. *Com. v. Maxwell*, 3 Cas. 444; *Eakin v. Raub*, 12 S. & R. 330; *Hortsman v. Kaufman*, 1 Out. 147. The "strong presumption of fraud" which may detain an insolvent debtor in confinement, must be confined to his not delivering up his estate to his creditors. *Mayor's Case*, 2 Yeates, 31. It is in no wise material that the action was one sounding in tort, *In re Thomas H. Craig*, 2 Phila. 391; *In re Dora Delaney*, 2 Phila. 393. The appellee has been in custody under the ca. sa., and in actual confinement for the same cause of action, and by the common law as well as the constitution, no person shall, for the same offense, be twice put in jeopardy.

The opinion of the court was delivered May 4, 1885, by

GREEN, J.—There was grave error in the order of the court below discharging the appellee from custody, and it must, therefore, be reversed. The appellee was in custody under a writ of *testatum fieri facias*, with a clause of *capias ad satisfaciendum*, issued upon a judgment for \$1,441.50, obtained in an action for a libel. He applied for the benefit of the insolvent law, and gave bond and made an assignment as required by the act of 1836, and subsequently petitioned for his discharge, but without having undergone the imprisonment of sixty days required by the act. His petition was granted, and he was discharged, although by the express terms of the act this could not be done until he had been in actual confinement for at least sixty days. The proviso of the 17th section of the act of June 16, 1836, Bright. Purd. p. 780, is as follows: "Provided that if the petitioner shall be in custody or confinement at the time of such order, by virtue of such process issued upon any judgment obtained against him

in an action * * * for a libel * * * where the damages found by the jury shall exceed the sum of one hundred dollars * * * he shall not be entitled to be discharged from such imprisonment or arrest until he shall have been in actual confinement during a term of at least sixty days." In *Com. v. Sheriff, etc.*, 6 Barr, 445, we said: "In the act of June, 16, 1836, an act relating to insolvent debtors (17th section), a distinction is taken between debts arising *ex contractu* and judgments obtained in actions of tort, for where the petitioner is in custody at the time of the order for his discharge in any action sounding in tort therein named, he is not entitled to be discharged from imprisonment until he has been in actual confinement during a term of sixty days." It will be seen at once that the present case comes within the very letter of the act, and of course no order of discharge could be lawfully made until the terms of the act were complied with. The fact that the appellee had been convicted of a criminal charge for the same libel and imprisoned under the sentence pronounced in that case has nothing whatever to do with the question of his discharge under the insolvent law, that imprisonment was the penalty of his crime. The confinement under the insolvent law is one of the conditions upon which he may become entitled to his discharge from custody for not paying the damages adjudged against him in the civil action. Unless he complies with the condition he cannot have his discharge.

Decree reversed and *procedendo* awarded.

If a carrier, to whom a package of goods is delivered to take to a certain place, open the package and take out *part* of the goods, it is larceny; yet it is not larceny if he take away the *whole* package. Chief Justice Kelyng says, "I marvel at the case put 13 Edw. IV. 96, that if a carrier have a tun of wine delivered to him to carry to such a place, and he never carry it, but sell it all, this is no felony; but if he draw part of it out, this is felony. I do not see why the disposing of the whole should not be felony also." It has been observed that this construction "*savors* of contradiction" and "stands more on positive law than sound reasoning."

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FRIDAY, JULY 24, 1885.

No. 30

Supreme Court of Pennsylvania.

WILLIAMS v. JOHNSON.

Elections—Jurisdiction—Contested elections—Amendment—Petition—Affidavit of electors to institute contest.

1. An affidavit of the requisite number of qualified electors is necessary to give jurisdiction to the court in the matter of a contested election.
2. An amendment to the petition and affidavit, by inserting after the time prescribed by the statute the name of a qualified elector in the place of one who is found to be disqualified, will not be allowed.

Certiorari to the Quarter Sessions of Luzerne county.

This was a *certiorari* by E. D. Williams and others from the action of the court in refusing to allow them to amend their petition, in the matter of the contested election of alderman of the Fourth ward of the city of Wilkes-Barre, and quashing said petition. The facts of the case were as follows: At the annual municipal election held in the city of Wilkes-Barre, on February 19, 1884, Wesley Johnson was returned as having received the highest number of votes for the office of alderman of the Fourth ward. On March 20, 1884, a petition to contest the election was filed in the Court of Quarter Sessions. On April 2, the respondent filed his answer and asked to quash the petition, for the reason that Decatur Blue, one of the persons who made the affidavit, was not a qualified elector. On the same day the petitioners asked leave to amend by adding the name of one of the other petitioners to the affidavit instead of Decatur Blue, the alleged disqualified elector. On June 16, 1884, the court refused to allow the petitioner to amend, and made absolute the rule to quash; Rice, P. J., filed an opinion in which, after deciding that Decatur Blue was not a qualified elector, he continued as follows: "Prior to the act of 1874 the power of the court to permit amendments was well recognized, and had been exercised in many cases. The act of 1874 provided that, after filing, the petition 'shall not

be amended unless such amendment shall be allowed by the proper court or judge, after notice to the other party, and hearing; and, if allowed, reasonable time shall be given to answer.' Act May 19, 1874, sec. 13. P. L. 211. It will be observed that the legislature did not undertake to confer a mere power on the court, but only to give implied recognition to the power already had, and to regulate its exercise. The act being declaratory of the law as previously had, we may safely refer to decisions made in cases arising before its enactment. In *Election Cases*, 15 Sm. 20, the authority of the court to permit an amendment necessary to a decision on the merits was fully discussed. The majority of the court, while deciding that the lower court had not exceeded its jurisdiction in allowing an amendment by adding another specification to the petition, were very careful to call attention to the distinction between such an amendment and one which would be essential to the jurisdiction, as the court, Agnew, J., on page thirty-two, said: 'There was no omission of anything to confer jurisdiction. The petition comes from the requisite number of qualified voters, was presented in due time, and its truth was sworn to by two of their number. The court having a rightful and general jurisdiction over the subject of the petition assumed it, heard the proofs,' etc. Again, on page thirty-five, he says, 'The amendment was not of an omitted prerequisite necessary to confer jurisdiction, nor of matter essential to the frame of the petition, but was a mere specification of fact comprehended within the general terms of the complaint, and belonging only to the proof.' In *Barber's Appeal*, 1 Weekly Notes, 307, the opinion of the Supreme Court is still more positive: 'There is one question in this record which properly may be noted, to-wit, the allegation that the petition was not signed by thirty qualified electors. If this clearly appears in the record it is a fatal defect, as without thirty such signatures the court acquired no jurisdiction.' The opinion then proceeds to show that, looking at the face of the petition, it appears that the thirty original signers were qualified, and that, looking into the record, it did not appear that any of them were adjudged by the court to be unqualified. If the petition had been defective in this particular, or if the record had shown that the court had adjudged any of the signers to be unqualified, it cannot be doubted from

the whole tenor of the opinion, and its express language, that the defect would have been held to be incurable and fatal to the proceedings. 'That court,' quoting from the opinion, 'cannot supply its own jurisdiction, but, having acquired it in a regular way, it may allow such amendments as will facilitate a hearing of the case on its merits.' In a still more recent case, decided under the act of 1874, the petition was quashed for the reason that it did not state that the signers were 'qualified electors who voted at said election.' The court also refused to permit it to be amended by adding those words. In affirming the judgment of the lower court the Supreme Court said: 'Clearly, jurisdiction cannot be conferred after the expiration of the time fixed by law for the contest. It does not appear in the petition for the amendment that the original petitioners were qualified electors who had voted at the election.' *In re Contested Election of C. B. Welti*, 3 Weekly Notes, 165, affirming the judgment in the same case, 22 Pitts. L. J. 97. In addition to these decisions the following cases decided in the lower court may be referred to: 11 Phila. 380; *Leisering's Case*, *Id.* 400; *Marshall v. Baldwin*, *Id.* 403. The proceedings to contest an election are purely statutory. The court cannot acquire jurisdiction except in the way and within the time prescribed by the act of Assembly. If, in fact, the court did not have jurisdiction when this petition was filed, and has it not now by reason of the fact that the affidavit was not made by the required number of qualified electors, it is clear, both from reason and authority, that, after the time for instituting a contest has elapsed, we cannot supply this omitted prerequisite necessary to confer jurisdiction by amendment.

"For this reason the petition must be quashed. And now, to-wit, June, 1884, the rule to show cause why the petition should not be quashed is made absolute."

The petitioners thereupon took this writ, assigning as error the action of the court as above.

"P. H. Campbell and E. S. Osborne, for appellants, cited: *The Overseers of the Poor of Beaver Twp. v. The Overseers of Hartly Twp.* 11 Pa. St. R. 254; *Laporte v. Hillsgrove*, 95 Pa. St. R. 269; *In re Contested Election of S. W. Trimmer*, 3 Luz. Leg. Reg. 153; *Battis v. Price*, 2 Pears. 456; *Reifsnnyder v. Musser*, 12 Weekly notes, 155; *Barber's Appeal*, 5 Nor. 392.

Henry W. Palmer, for appellee, was not heard.

The opinion of the court was delivered April 27, 1885,

PER CURIAM.—There is no error in this record. While amendments of the petition may be allowed for some purposes, yet, when the attempt is to give jurisdiction after the time for initiating a contest has expired, it should not be permitted. An affidavit of the requisite number of qualified electors is essentially necessary to give jurisdiction. It must be made within the time prescribed by the statute. If not so made, it is fatal to the proceedings, and the defect cannot be cured by amendment thereafter.

Judgment affirmed.

BOOK NOTICES.

GUARDIAN AND WARD IN PENNSYLVANIA. Being the seventeenth chapter of Commentaries on the Law of Pennsylvania. By Tatlow Jackson. Philadelphia: Rees Welsh & Company, 1885.

"The above named work contains about 210 pages and is elementary in its character, in which the author has gathered the leading principles, definitions, and decisions found in the law of guardian and ward as understood and applied in this state. It discusses the different kinds of guardians and their appointment; the ages of minors of which guardians are appointed; the privileges and disabilities of minors; the appointment and discharge of guardians; their powers, rights, and duties; their sureties; and the acquisition, partition, mortgaging, and sale of ward's property. Numerous decisions are cited, and full extracts from acts of assembly are inserted when needed to complete the treatment of a subject."

The above is from the columns of the *Legal Intelligencer*, and in connection with the following from the *Weekly Notes of Cases*, fully indicate the nature and character of the work:

"The 'Table of Distribution and Descent' is a scientific analysis of the Pennsylvania statute law regulating the devolution of the personal and real estate of intestates; giving, in succinct form, the result applicable to every contingency of heirship or succession. The several subdivisions consist, practically, of direct answers to the question, who are entitled to take under any given contingency, and some of the questions here so clearly answered would puzzle many lawyers, as well as students. We know of no other book where such a compendium on this subject can be found."

AN ALPHABETICAL AND ANALYTICAL INDEX TO THE PENNSYLVANIA SUPREME COURT REPORTS. 1st Dallas to 5th Outerbridge. By Robert E. Wright, late state reporter. Two volumes. Vol. I., Part II., J to Z. Philadelphia: Rees Welsh & Company, 1885.

This work completes Mr. Wright's Index to the Supreme Court Reports, and we can only repeat what was said by us in 1884, as reported in our review of Part I. of the book:

* * * "What we may call the first edition came out in 1874, and included the State Reports up to 20th P. F. Smith. It was followed in 1777 by an Index on the same plan of the Pennsylvania Reports outside of the Supreme Court. The present re-publication of the work includes the State Reports only, and indexes them down to the last volume. The general plan pursued is the same as in the edition of 1874, except the very important improvement is introduced of citing cases by *name* as well as by book and page. It will be remembered that in the first edition the latter was the method of citation. The divisions and subdivisions have been multiplied and rearranged in such a way as to facilitate access to the rulings of the court, and in every way this useful key to the Reports has been amplified and improved. The two volumes of Pennypacker's Reports and the two of Pearson's Reports are included in this edition, the latter because of the peculiar jurisdiction conferred on the Common Pleas of Dauphin county in relation to commonwealth cases."

* * * The present volume contains 872 pages, of which 94 pages contain a "table of cases decided by the Supreme Court of Pennsylvania, from 1st Dallas to 8th Outerbridge and 2d Pennypacker inclusive, that have been explained, extended, restrained, modified or overruled by subsequent decisions or legislative enactments. In the usual collections of 'cases overruled, etc.,' there are citations from foreign text books, and from the Supreme Court Reports of other states to the effect that certain Pennsylvania decisions have been overruled by their highest tribunals." The work includes many of the most important heads of legal inquiry, such as judgment, jury, justice of the peace, landlord, land warrant, lease, legacy, limitations (statute of), lunatics and drunkards, mandamus, marriage, married women, mechanics' lien law, mortgage, municipal corporations, negligence, officers, Orphans' Court, parol evidence, partition, part-

nership, payment, public schools, railroads, rent, roads, sales, set-off, sheriff and sheriff's sale, specific performance, surety, taxation, tenant, trustee, trust estates, unseated lands, wills, witness, and numerous others to which the profession is daily seeking authorities.

"To those who may be unfamiliar with the work, it may be explained that this is not a digest, but a classification of the cases under the proper heads of subject matter and their minute subdivisions, thus furnishing a ready key to the examination of the decisions on any given point. The practical value of such a plan depends upon the care and thoroughness with which the subdivisions are made and the cases collected, and from our examination of the work in question, it would appear that it is well done. The cases are grouped chronologically, so that a glance will show the last decision upon a given subject."

We can cheerfully recommend Wright's Index as one of the very best books of its kind ever published in this or any other state, and the author is to be congratulated for furnishing to the profession such a labor-saving work.

PENNSYLVANIA SUPREME COURT REPORTS. Containing cases in law and equity adjudged in the Supreme Court of Pennsylvania, being those cases not designated to be reported by the state reporter. By Samuel W. Pennypacker, assisted by Andrew M. Beveridge, Charles H. Sayre, and Albert B. Weimer, all of the Philadelphia bar. Vol. III.—Cases of various terms of 1882 and 1883. Philadelphia: Rees Welsh & Company, 1885.

This volume, the third in the series, fully sustains the reputation of the preceding volumes, and makes it of as great a necessity as the regular reports of the Supreme Court. The volume before us contains 645 pages, the type used is excellent, and the binding is equal to the best of our law reports. Mr. Pennypacker and his assistants have ably and conscientiously edited the work and no lawyer in active practice can afford to be without it. Separate lists of the judges of the court below, whose decisions appear in the volume, and of the masters, referees, auditors, commissioners, and counsel, have been added—a valuable aid to the searcher for a case whose name has been forgotten

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FRIDAY, JULY 31, 1885.

No. 31

Court of Common Pleas of Luzerne County.

COMMONWEALTH EX REL. ZIMMERMAN *v.* REILLEY *et ux.*

Habeas corpus—Infants.

In a contest between relatives for the custody of infants, where they will not in any event be under the personal care and guardianship of a parent, the question is one of discretion, and in exercising that discretion the judge will chiefly consider the welfare of the infants.

Habeas corpus to obtain possession of minor children—George Meixell and Viola Meixell.

The opinion of the court was delivered November 29, 1880, by

RICE, P. J.—The boy George is aged about seven years, and his sister, Viola, about six years. Their mother is deceased and they are now in the custody of her parents, the respondents. There is no allegation that the respondents are not entirely proper persons to have the custody, and there is every indication that the children are happy in their present home, and that they are there affectionately treated and properly trained. The father of the children is living but has absconded from the state on account of some alleged offense. If the testimony as to his declarations is true, he had not behaved himself prior to his departure as a man of good moral character, but had squandered a portion of his wages which ought to have gone toward the rearing of his children properly, in houses of prostitution. The petitioner is an aunt of the children on the father's side. She formerly kept house for her brother and had the care of the children. Since he left she has married. Testimony has been introduced as to her treatment of the children while under her care, and while it may show that she lacked that patience which comes

with experience in the care of children, it does not show that she regarded them otherwise than affectionately, or that she would be an improper person to have their care. Her husband has every appearance of an honest, industrious, temperate, and kind-hearted man, but it cannot be argued that he would have that affectionate regard for the welfare of the children which those more closely allied to them would have. The great weight of the testimony shows that the father of the children before going away had agreed and declared that the boy George should be placed in the custody of the respondents, and that, in pursuance of this understanding, the petitioner took the boy to the respondents and left him with them. As to the daughter, Viola, however, the testimony seems to show that the father before going away arranged to have her kept in the custody of the petitioner. If, under these facts, we were to decide the case as one of pure legal right, a separation of these children must ensue, for as to the boy George we do not think the evidence establishes a legal right to the custody in the petitioner. Admitting that the letters of William J. Meixell are genuine, they are at the best but hearsay evidence as to his wishes. Again, they are somewhat contradictory in their statements, for in one place he speaks of having placed the *children* in Mr. Zimmerman's care, and in another place he says, "John said he would take care of *Viola* until I got a good job, etc." * * * The mere legal right of the petitioner must depend on the arrangement made by the father before he went away, and all the testimony and circumstances go to show that this was made only as to Viola. It certainly cannot be contended that a father who has absconded, leaving his children without his parental care, can, from the security of his unknown hiding place, dictate absolutely by letter what shall be the custody of the children whom he has thus left. This being the case we should feel bound, both legally and as a matter of discretion, to leave George in the custody of his grandparents, the respondents. But what shall be done with Viola? Shall her best interests and welfare be considered, or shall she be separated from her brother according to the expressed wish of her absent father? If our own judgment and discretion may be exercised, then we say unhesitatingly that both children ought to be left where they

are for the present at least. But if, on the other hand, the father were here seeking the personal custody of his children, it is probable, unless something more were shown than appears now as to his personal character, that we should deliver them into his custody. But that is not the case. It is in reality a contest between relatives, and in neither event of the issue will the children have the personal care and guardianship of a parent. Under the uniform decisions in this state the question is almost purely one of discretion, and in exercising that discretion the welfare of the children is chiefly to be considered. In support of this proposition we have only time to merely refer to some of the authorities. *Com. v. Addicks*, 5 Binn. 519; *Com. v. Gilkeson*, 5 P. C. 30; *Demott v. Com.* 14 Sm. 302-306. In the last cited case Chief Justice Agnew said (page 307), "I consider it the well settled doctrine of the writ of *habeas corpus* that though it is a writ to remove the unlawful restraint of liberty and restore from unwarranted imprisonment, it is not of right to be used to transfer the custody of the person from one claimant to another, but in such a case the judge administering the functions of the writ is guided by a sound discretion upon the evidence." (See also *Com. ex rel. v. Barney*, 1 Luz. Leg. Reg. 449; *Com. ex rel. v. Hart*, 8 W. N. C. 156). Our best judgment, formed from all the circumstances, is, that for the present, at least, the children should be left in the custody of their grandparents. This order, however, must not be construed as authority for excluding them from the privilege of seeing or visiting their father's relatives, nor will we countenance for a moment any attempt on the part of their custodians to alienate in any way the natural affection of the children from their father or his family. And in order that we may the more effectually protect the children and their future welfare, we make the following order:

It is ordered by the court that the minors, George and Viola Meixell, be remanded into the custody of William Reilley and Catharine his wife, and there to remain until the further order of the court. The writ of *habeas corpus* to stand over as a pending writ, subject to such further order or action as may hereafter be adjudged by the court to be right and proper in relation to the custody of said minors.

Court of Common Pleas of Luzerne County.

NYMAN v. SULLIVAN *et al.*

1. To support an action of trespass there must exist in the plaintiff a right of property, and also a right to immediate possession.
2. The mere fact of becoming a purchaser at a judicial sale will not render a party liable in trespass, although, under certain circumstances, replevin might lie.
3. Plaintiff may enter a *nolle prosequi* as to one defendant only.

Exceptions to referee's report.

The opinion of the court was delivered April 20, 1885, by

WOODWARD, J.—The judgment against Michael Sullivan, one of the defendants in this case, cannot be sustained. A right of property alone will not support an action of trespass. There must exist also a right of immediate possession. And in the case before us, as we understand the finding of fact by the referee, this right of possession by the plaintiff is wanting. At least we find nothing in the report itself, nor in the evidence attached thereto, to justify an opposite conclusion. Nor is there any proof that the plaintiff indemnified the constable, as a condition precedent to his making the levy complained of. And it has been held in many reported cases that the mere fact of becoming a purchaser, although with knowledge of the want of title in the defendant, will not render a party liable in trespass, although, under certain circumstances, replevin might be sustained. (See *Ward et al. v. Taylor*, 1 Barr. 238; *Gloss et al. v. Black*, 10 Nor. 418; *Berkey v. Auman*, *Id.* 481; *Moran v. Hart et al.* 11 Luz. Leg. Reg. 45.) As the judgment must be reversed as to Michael Sullivan, for the reasons already stated, it will not be necessary for us to pass upon all the exceptions filed in the report.

The judgment of the referee is affirmed upon condition that the plaintiff enters a *nolle prosequi* as to Michael Sullivan, one of the defendants; otherwise judgment to be entered for the defendants. (See 1 Pa. St. R. 238; 7 Pa. St. R. 24.)

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FRIDAY, AUGUST 7, 1885.

No. 32

Court of Common Pleas of Luzerne County.

BOETTNER & CO. v. STEGMAIER & SONS.

Hops were shipped to defendants without a previous order. The defendants expressed surprise at the shipment, and notified the plaintiffs that they would inform them later whether they would keep them. To this the plaintiffs made no reply. In an action for the price—*Held*, 1st, the contract was, at the best, conditional; 2nd, the defendants were entitled to a reasonable time in which to inspect and, if necessary, to test the hops; 3d, the hops having been kept six weeks, it was necessary for defendants to aver in their affidavit of defense not only that a test could not be made before, but also that a test or trial was necessary.

Rule for judgment for want of a sufficient affidavit of defense.

The opinion of the court was delivered July 27, 1885, by

RICE, P. J.—We cannot assent to the first proposition of the plaintiffs' counsel that there was an absolute sale on October 7, 1884. The twenty bales of hops were shipped to the defendants without a previous order. The latter, instead of accepting them unconditionally, wrote to the plaintiff's expressing surprise at the shipment, and notifying them that they would inform them later whether they would retain the hops. To this, so far as now appears, the plaintiffs made no objection, and, therefore, it may be assumed that the reservation of this option by the defendants was satisfactory to the plaintiffs, and that the contract was, at the best, conditional. It is, perhaps, immaterial here whether this conditional contract was of the nature of a sale "on trial" or "on approval," or of the nature of the bargain known as "sale or return." In the former class of cases there is no sale till the approval is given either expressly or by implication, resulting from keeping the goods beyond the time allowed for trial. *Benj. on Sales*, §595. In the latter class of cases the property passes sub-

ject to the right to rescind and return. *Hunt v. Wyman*, 100 Mass. 198; *Hickman v. Shimp*, 2 Ch. Co. Rep. 445. The principle, equally applicable in both classes of cases, is that the buyer must act within the time specified, if one be agreed upon, or, if not, then within a reasonable time; otherwise the sale will become absolute, and he will be liable for the price. If it is a sale "on trial" he must make the trial, and if he disapproves must make known his disapproval to the seller. If it is the bargain known as "sale or return" he must exercise his option by rescinding and returning. In both cases he must act within a reasonable time. *Hickman v. Shimp*, *supra*. This principle is applicable to the contract in question, and the chief subject of inquiry is, whether, on the case as it is now presented, the defendants exercised their option of disapproving the hops and returning the same within a reasonable time. "What is a reasonable time where the facts are ascertained, is ordinarily a question of law for the court, to be determined upon a consideration of all the circumstances. Where, however, the facts are not clearly established, or where the question depends upon other controverted matters it is, under proper instructions, for the jury." *Hickman v. Shimp*, *supra*. The defendants are brewers, and the hops were required by them not for sale but for use in their business. They had refused to give an order for the twenty bales until they could try the five bales which they did order. Instead of waiting for such order the plaintiffs sent on the twenty bales as well as the five bales at the same time. Reasonable time in a sale, made under such circumstances, must be held to be long enough to permit the defendants to inspect the goods, and, if necessary, to test them for the purpose of ascertaining whether they were fitted for the defendants' uses. If the fitness of the hops for the defendants' uses could be determined by inspection, then, clearly, the time which elapsed between the delivery of the goods and the notice of disapproval and return of the goods (about six weeks) was unreasonable. *Fink v. Knauss*, 4 W. N. C. 356. If, however, it was necessary to test the hops, and this, as is alleged in the affidavit, could not be done until about the time when the notice of disapproval was sent, then we are not prepared to say, as matter of law, that the defendants exceeded a reasonable time

in exercising their option to purchase or right of rescission and return as it may be called. The only defect then which we discover in this affidavit is, that it does not aver that a test or trial, such as the hops were subjected to, was necessary in order to ascertain whether they were fit for the defendants' uses. We infer that the omission of this averment which, in view of the lapse of time, we regard as essential, was unintentional, and therefore it is a proper case for permission to file a supplemental affidavit.

Now, July 27, 1885, it is ordered that the rule be discharged, upon condition, however, that the defendants file a sufficient supplemental affidavit of defense within fifteen days from this date, otherwise rule absolute.

S. J. Strauss, Esq., for plaintiffs.

W. S. McLean, Esq., for defendants.

Court of Common Pleas of Luzerne County.

RENNIMAN v. RENNIMAN.

Divorce—Alimony pendente lite.

1. It is the uniform practice in divorce suits, if the wife has no separate estate, whether she be libellant or respondent, to make an order for maintenance *pendente lite*, and expenses.
2. Her separate earnings (as a school teacher) and his indebtedness, are both proper facts to be taken into account in determining the amount which ought to be allowed her for her maintenance pending the litigation, but neither fact, nor both together, can be set up to entirely relieve him from his legal and moral obligation so long as he is in undisturbed enjoyment of his estate, and in receipt of the income therefrom.

Rule to show cause why the libellant shall not pay to the libellee a reasonable sum for her support *pendente lite*, and to employ counsel.

The opinion of the court was delivered June 8, 1885, by

RICE, P. J.—As the husband, whilst the marriage contract is undissolved, is liable for the wife's support, and is bound to furnish her with necessaries, it is the uniform practice, if the wife has

no separate estate, in a suit for divorce, whether she be libellant or respondent, to make an order for maintenance *pendente lite*, and expenses. 2 Br. T. & H. Prac. §2345, and cases cited. The present case does not come within any of the exceptions to this general rule. The libellant is a partner in a grocery business, and also the owner of a drug store; the respondent is a teacher in the public schools of the city of Scranton. The libel charges desertion; the answer unequivocally denies the charge, and an issue has been awarded. Further than what the pleadings show we have no information as to the merits of the case, but as the case stands the innocence of the respondent must be presumed. The two reasons urged against the order prayed for are: first, the respondent is in receipt of an income from her exertions as a school teacher; second, that the libellant is indebted to an amount nearly, if not quite, equal to the value of his stock in trade. The counsel for the respondent argues that her separate earnings are not to be considered. We have examined the authorities upon the subject with some care, and, without elaboration, our conclusions are, that her separate earnings as a school teacher and his indebtedness to general creditors are both proper facts to be taken into account in determining the amount which, under all the circumstances of the parties, ought to be allowed to her for her maintenance pending the litigation, but neither fact, nor both together, can be set up to entirely relieve him from his legal and moral obligation, so long as he is in undisturbed enjoyment of his estate and in receipt of the income therefrom. If at any future time she shall be deprived of her income, or his income from his business shall be taken from him by his creditors, it will be in the power of the court to make such enlargement or reduction of the monthly allowance as the circumstances of the case may require.

The rule is made absolute, and it is ordered that within thirty days from this date the libellant pay to the respondent for counsel fees the sum of fifty dollars, and that he also pay to her on the eighth day of each month hereafter the sum of ten dollars, for her support pending this suit.

D. & H. M. Hannah, for rule.

John T. Lenahan, *contra*.

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FRIDAY, AUGUST 14, 1885.

No. 33

Court of Common Pleas of Luzerne County.

WHITE v. WALKER.

Pleadings—Setoff.

The defendant pleaded *non assumpsit payment with leave, etc.*, and on the trial before the referee gave in evidence an account against the plaintiff for goods sold and delivered, which the referee allowed and reported a balance in defendant's favor. *Held*, that a certificate in the defendant's favor was proper under the pleadings.

Exceptions to report of referee.

D. M. Jones, attorney for the defendant, presented the following brief:

Judge Black (a) with Gibson (b) quite concurred
To set the "offset" plea aside;
While Tighlman, (c) for he long had erred,
Was loth to "setoff" when he died (d).

(a) *Balsbaugh v. Fisher*, 7 H. 98.

(b) *Calvin v. McClure*, 17 S. & R. 385.

(c) *Anderson's Ex'rs v. Long*, 10 S. & R. 62

(d) See opinion of Judge Gibson in *Calvin v. McClure*, *supra*.

The opinion of the court was delivered October 8, 1883, by

RICE, P. J.—This case was brought into court by appeal from the judgment of a justice of the peace. The defendant pleaded "*non assumpsit*," payment with leave, etc. On the trial before the referee the defendant gave in evidence an account against the plaintiff for goods sold and delivered, which the referee allowed, and reported a balance in the defendant's favor. It is contended

by the plaintiff, that under the pleadings there being no notice of setoff, there could not be a certificate in the defendant's favor. In the case of *Calvin v. McClure*, 17 S. & R. 385, it was held that "the plea of payment will authorize the finding of a sum due to the defendant whenever the evidence will; for such is the provision of the act of Assembly." Gibson, C. J., in commenting on two earlier cases, says: "I am aware that a contrary opinion was intimated by Chief Justice Tighlman in *Anderson's Ex'rs v. Long*, 10 S. & R. 62; but *King's Adm'r v. Diehl*, 9 S. & R. 409, on which he seems to have relied, does not bear the position out * * * and I am enabled to say that the opinion now expressed was adopted by that excellent judge before his death." In the case of *Balsbaugh v. Fisher*, 7 H. 98, Black, C. J., said: "By the defalcation act of 1705, no other plea than payment is necessary to let in a setoff. The certificate in favor of the defendant was, therefore, technically right." In the case of *Glamorgan Iron Co. v. Rhule*, 3 Sm. 93, the verdict having been for less than one hundred dollars, the question arose as to whether the plaintiff was entitled to costs. It was admitted that he would have been if his claim was reduced by setoff. "But," says Thompson J., "that there was a setoff in this case does not appear by the record. It is not implied, we think, by the plea of 'payment,' alone, nor receivable under it, unless notice of special matter be given. '*Payment with leave*,' etc., would, I think, undoubtedly allow the inference of setoff in reduction of the claim." We do not understand the case of *Hunt v. Gilmore*, 9 Sm. 454, and *Blessing v. Miller*, 40 Leg. Int. 60, as overruling these decisions, for they make no reference to them whatsoever. They are cases where the defense was an equitable one growing out of the plaintiff's own violation of the contract upon which he sued, and the court had reference to such a defense and not to an offset based on an entirely distinct demand, where they said "No doubt in such a case if the defendant pleads only the general issue, or payment with leave to give the special matter in evidence, and puts in no special plea, or gives no notice of setoff, while he is entitled to take defense to the extent of the plaintiff's claim, he cannot go beyond it and have a certificate in his favor." Until the decisions in the cases cited are distinctly overruled, we are

bound by them, and upon their authority the present exceptions must be overruled.

The exceptions are overruled, the report is confirmed, and judgment is entered for the defendant in the sum of twenty-one dollars and twenty cents, with interest from November 6, 1882.

W. S. McLean, Esq., for plaintiff.

D. M. Jones, Esq., for defendant.

Court of Common Pleas of Montgomery County.

COMMONWEALTH v. FINNEL.

A butcher having a slaughter house, and selling meat of his own killing in the public market or from his wagon, is not liable to assessment for a license. But if, in addition, he deals in cured or salted meats not of his own killing, to the extent of over five hundred dollars per year in value, he is liable to taxation for license.

Appeal from the assessment of the mercantile appraiser.

The opinion of the court was delivered October 6, 1884, by

BOYER, P. J.—The appellant is a butcher having a slaughter house of his own, and sells meat of his own killing in the Conshohocken market and from his wagon. For this he is not liable to be taxed. But he is a dealer in cured or salted meats to the extent of over five hundred dollars per year, not of his own killing, which he sells from his wagon or at his stall in the market. Although he has a slaughter house and can sell the meat of his own killing either in market or from his wagon, without a license, he is taxable under the act of April 9, 1870, which provides that "manufacturers and mechanics who shall sell goods, wares, or merchandise other than their own manufacture, not exceeding the sum or value of five hundred dollars per annum, shall not be classified or required to pay any annual tax or license fee; but if such sales shall exceed the sum of five hundred dollars per annum aforesaid, they shall be classified in the same manner, and required to pay the same annual tax as is now required to be paid by dealers in foreign merchandise."

The decision of the mercantile appraiser is affirmed.

Court of Common Pleas of Montgomery County.

KINGSTON v. HOFFMAN.

A building fitted up and used as a store property should be described as such in the advertisement of the sheriff, and not merely as a "house." Sheriff's sale set aside because of such omission in the description of the property.

Exceptions to sheriff's sale.

The opinion of the court was delivered April 8, 1885, by

BOYER, P. J.—The exceptions to the sheriff's sale are based upon alleged material omissions in the description of the property; the building being described in the advertisement of sale simply as a "house," instead of describing it as a *dwelling* house; and the fact of its being fitted up and used as a *store property* having been also unnoticed in the sheriff's description. I do not regard the omission to describe the building as a dwelling house as a very material omission in this case, as the stories, rooms, stairways, kitchen, and range in it, with other appurtenances of a dwelling house embraced in the description of the property, sufficiently indicate the building to be a dwelling house. But the omission of the fact that it is also a *store property*, and has been occupied and used as such, and remains fitted up for that purpose, may have operated to prevent bidders in pursuit of such a property from attending the sale. It is proper that all the material advantages of the property should be stated in the advertisement of a sheriff's sale, so as to attract purchasers of every description; and it may reasonably be supposed that if the property had been advertised as a store property, in addition to its being a dwelling house, it would have enhanced its value in the estimation of a portion of the public, and stimulated competition. The low price which the premises brought at the sheriff's sale may have been owing to the want of a full description to which the owner is entitled. For this reason it is but fair that such opportunity should be afforded.

The sheriff's sale is set aside.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, AUGUST 21, 1885.

No. 34

Court of Quarter Sessions of Luzerne County.

IN RE DELAWARE STREET.

Streets, assessment of damages for opening.

- 1 Where the law makes it the duty of viewers to endeavor to procure releases from the persons over whose land the road or street is laid, it will be presumed that they performed their duty in this particular until the contrary is shown. It is not essential to state the fact in the report.
- 2 Under the charter of the city of Wilkes-Barre the rule of assessment for contribution against adjoining property owners upon opening streets is "benefits received." Hence, where the viewers apportioned and assessed the expense upon the properties supposed to be benefitted according to the foot front, without regard to other facts, it was held that the basis of assessment was erroneous, and their report was set aside.
- 3 The frontage rule of assessment is one which the legislature, and that body alone, may adopt as a substitute for an assessment by a disinterested tribunal. Viewers appointed to ascertain the benefits and apportion the expense according thereto, do not perform their duties under the law by the adoption of this arbitrary rule without regard to other facts.
- 4 Where the report of viewers (in the city of Wilkes-Barre) is made on a totally erroneous basis, so as to be incapable of modification, it is the duty of the court to set it aside.
- 5 The rule which excludes the testimony of jurors tending to impeach their verdict has never been applied with the same strictness to the testimony of road and street viewers.

Exceptions to report of viewers.

The opinion of the court was delivered July 27, 1885, by

RICE, P. J.—I. Is it essential that the report of viewers appointed to assess damages upon the opening of a street in the city of Wilkes-Barre should show affirmatively that the viewers endeavored to procure releases from the persons over whose land the street has been laid? In deciding this question it is unnecessary to say whether the act of May 14, 1874, P. L. 164, applies to the view of a city street or not; for, whether it applies or not, the authorities hold that it will be presumed that the viewers performed their duty in this particular, and that all things were rightly

done unless the contrary is shown. The precise point was before the court in the recent case of *Road in South Abington*, 2 Com. Pleas Reporter, 71, and it was there held that the fact need not be set forth expressly in the report. (See also *McConnell's Mill Road*, 8 C. 285; *Road in Chartiers*, 10 C. 413.)

II. The damages allowed by the viewers to the Lehigh Coal and Navigation Company are \$4,648, and the total amount assessed against the other adjoining property owners for benefits is exactly the same. We agree with the counsel for the report in their contention that the mere coincidence of these two amounts is not, in itself, ground for concluding that the amounts assessed for benefits are excessive, or that the assessments were arbitrarily made so as to equal the damages without regard to the actual benefits to be received. The viewers were certainly not bound to assess more for benefits than would be necessary to pay the amount assessed for damages, and if the benefits exceeded the damages the property owner has no cause for complaint, if the viewers have cut down his assessment for benefits to a proportionate part of the aggregate damages. The test to be applied to these assessments is that furnished by the act of assembly under which they are made. It provides that the viewers shall regard "the advantages and disadvantages caused to the several properties adjoining said street, lane, or alley, and shall estimate and allow all persons injured thereby such damages as they shall have sustained over and above all advantages, and also make assessments for contribution upon all such properties as shall be benefitted by the opening, etc., of said street, lane, or alley, such sums respectively as they may have been benefitted over and above all disadvantages." Section 16 act May 4, 1871, P. L. 544. Assuming, as we have already stated, and as all concede, that the viewers are not required to assess a greater sum for benefits than is required to pay the damages, it follows that the property owner may not only complain of an assessment which, taken by itself, exceeds the benefits received, but may also justly complain if the apportionment of the damages amongst the several property owners benefitted is made on a basis, not authorized by the act of assembly, which results in an imposition upon him of an undue proportion of the burden. For example, if A's property is

benefitted in the sum of one thousand dollars, and B's in the sum of twelve hundred dollars, and the total damages allowed are fourteen hundred, an assessment for contribution of twelve hundred dollars against B, and of two hundred dollars against A, would be grossly unequal and unjust. And if this inequality resulted from the arbitrary adoption by the viewers of the foot front rule, when their authority and duty under the law were to make the assessments for contribution according to benefits received, can there be any doubt that the assessment would be illegal? The principle upon which all local assessments of this nature are rested is benefits received. We do not question the right of the legislature in the exercise of its taxing power to declare, within reasonable limitations, that the expense of such improvements shall be borne by the adjoining property owners in proportion to their frontage. But the justification for such a method of apportioning the expense rests upon the idea that the properties will be specially benefitted in that proportion. It is a rule which, within reasonable limitations, the legislature, and that body alone, may adopt as a substitute for an assessment by a disinterested tribunal. Viewers appointed to ascertain the benefits and apportion the expense according thereto, do not perform their duties under the law by the adoption of this arbitrary rule without regard to other facts. If the legislature had contemplated an apportionment of the expense according to the frontage rule, a view of the premises would have been unnecessary. Mr. Cooley says: "Although, as has been stated, an assessment by frontage is really based upon the idea that the estates taxed receive a benefit in proportion to frontage, yet, where the legislature have made benefits the rule of assessment, and provided for assessors or commissioners to ascertain and apportion them, it is not arbitrarily to be assumed that the benefits to any particular lot are, in fact, in proportion to its front on the improvement. In such cases the assessors have a duty to perform on inspection and examination of the several estates, and a report by them that they have assessed the expense by the foot front without saying that they find the benefits in that proportion does not affirmatively show a performance of their duty." Cooley on Taxation, 454. The language quoted from the text is fully sustained by the authori-

ties cited by the learned author. (See *State v. Hudson*, 5 Dutch. 104; *State v. Bergen*, *Id.* 266; *Clapp v. Hartford*, 35 Conn. 66; *Warren v. Grand Haven*, 30 Mich. 31; *Hundley v. Commissioners*, 69 Ill. 559; *Burroughs on Taxation*, 148.)

Upon examination of the draft attached to the report in the present case, it appears that the assessments against the several adjoining properties were made at the rate of one dollar per foot front, and that, too, without regard to location or depth of lot. Nevertheless, inasmuch as the report declares that the assessments were made on the basis of benefits over disadvantages, it is sufficient in form, and the *prima facie* presumption is, that the viewers concluded that the several properties were benefitted in the proportion stated. We shall not go over the testimony at length, but an examination of the depositions will show two facts to be established with sufficient clearness: First, that the several properties along the line of the street are not benefitted per foot front according to the same ratio; second, that the viewers, instead of estimating the benefits to each adjoining property and apportioning the expense according thereto, arbitrarily adopted and applied the foot front rule without regard to other facts. There would also seem to be some reason for believing that they proceeded upon the theory that the assessments for benefits must equal the damages allowed, so that no expense would come upon the city. One of the viewers says: "It is understood in opening streets that the benefits derived shall always be assessed or equal the damages sustained by parties; that has been the usual rule. * * * There were some damages, but opening it would give them lots on both sides of the street, and if they wanted the street opened from Market street through, it was an advantage to them to sell lots, so we calculated the number of feet in the damages so as to assess them so much per foot. We apportioned these damages over the foot front; that is the rule we adopted. Question. Why did you adopt such a rule? Answer. It is the only one we could be governed by, to assess fronts. Q. To make the advantages balance the damages? A. That rule, I suppose. We were instructed so there would be no expense to the city. All damages should be paid by benefits derived. Q. Whether derived or not. A. Whether derived or not." In view

of these facts we have no hesitation in saying that it is the duty of the court to reject the report. It is incapable of modification, for the reason that the view from the beginning was made on a totally erroneous and unauthorized basis. It is said that the report ought not to be set aside for mere mistake of method unless the results are wrong. This we concede. But, as we have already stated, the arbitrary adoption by the viewers of the frontage rule as a substitute for an assessment upon inspection and examination of the premises, resulted in imposing upon the several exceptants an undue proportion of the expense, and this is a matter of which they have a right to complain. As was said by the court in *Clapp v. Hartford*, *supra*, so it may be said here with equal pertinency: "Two different lots, with the same length of front may differ greatly in value, owing to a difference in location or other causes, and hence be benefitted in different degrees. It is certainly reasonable that the one receiving the greater benefit should pay the greater tax, yet an arbitrary rule like the one contended for taxes both alike."

III. The rule which excludes the testimony of jurors tending to impeach their verdict has never been applied with the same strictness to the testimony of road and street viewers. On the contrary, many cases can be found in which such testimony has been received to show an error in the basis of assessment. (See *In re Barbadoes Street*, 8 Phila. 498; *Patten v. Susq. R. R. Co.* 1 Pears. Dec. 48; *R. R. Co. v. Heister*, 8 Barr. 451.

For the reasons given in the foregoing opinion the report of viewers is set aside.

S. J. Strauss, H. A. Fuller, I. P. Hand, and W. S. McLean, for report.

E. P. & J. V. Darling and George R. Bedford, *contra*.

The obsequious parliament of Richard III. passed, at the special instance of that famous sovereign, a number of private acts, one of which was "to prove the king to be true and undoubted heir to the crown, and to make his brother's children bastards;" and the bulk of these enactments was quite in accordance with this sample.

Court of Common Pleas of Montgomery County.

COMMONWEALTH v. BICKINGS *et al.*

Persons styling themselves "butchers," but having no slaughter houses; who sell meats in market, or otherwise, not of their own killing, but prepare and handle it after it has been dressed, and cut it into suitable pieces for sale, are taxable for license as dealers in meat.

Appeals from the assessment of the mercantile appraiser.

The opinion of the court was delivered October 6, 1884, by

BOYER, P. J.—The appellants have no slaughter houses, and do not slaughter the animals in whose meat they deal. They handle the meat after it is dressed and cut into suitable pieces for sale. They sell it mostly at their rented stalls in market. They cannot be called manufacturers or mechanics, but are, more properly speaking, dealers in meats. They come under the designation of "dealers in goods, wares, and merchandise, the growth, product, and manufacture of the United States," as designated by the 11th sec. of the act of April 22, 1846. Such dealers are taxable under the provisions of that act, whether they keep a store or warehouse or not. It is only manufacturers or mechanics who, by the act of February 27, 1868, are exempted from taxation for license when they sell goods of their own manufacture, and have no store or warehouse apart from their manufactories or workshops. It follows, therefore, that the license tax imposed by the mercantile appraiser in the foregoing stated cases was lawfully assessed, and his decisions therein are affirmed.

Lord Coke, in his Third Institute, observes of the statutes of apparel, that many of them "fight with and *cuff* one another." Lord Herbert remarks that these laws for the government of fashion themselves *changed fashion*. It was not till the reign of James I. that Englishmen obtained liberty of apparel.

THE LUZERNE LEGAL REGISTER.

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FRIDAY, AUGUST 28, 1885.

No. 35

Court of Common Pleas of Luzerne County.

MYERS v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

1. Where the bond of a railroad company for the payment of damages for the taking of land for a branch road is merely informal, not fatally defective in its execution, objection should be made at the time of its presentation for approval.
2. The formal attestation of the seal of the company and of the signature of the president is not essential to its validity. In a suit on the bond these may be proved otherwise.
3. Authority from the company to file the bond is to be presumed in the first instance from its execution and presentation for approval. After the corporation proceeds under it to take the land they will be estopped from denying the authority under which it was filed.
4. Authority of railroad company to take land for "branch" or "side track" considered.
5. Where a bond of a railroad company is presented for approval, and it does not appear upon the face of the proceedings that the proposed appropriation of land is illegal or unconstitutional, the court will not receive testimony tending to show that the corporation is proceeding in excess of its powers.
6. The giving and approving of the bond are conditions precedent to the exercise of the power to appropriate land by a railroad company, but these acts are not conclusive against the land owner, except as to those matters which are essential to the adjudication.

Rule to show cause why the bond filed in this case shall not be stricken from the files.

The opinion of the court was delivered October 17, 1881, by

RICE, P. J.—This bond recites the fact that the defendant company has "located a *railroad switch to improve their route south, and serve as a feeder for the main line of road*, which was before the Lackawanna & Bloomsburg Railroad, passing for not over one thousand feet through and upon the lands of Frederick B. Myers, in Kingston borough." It was presented to the court for approval on May 16, 1881, and proof being made that due notice

had been served on F. B. Myers, and that with the service of notice the bond had been tendered to and refused by him, and, there being no exceptions, the bond was approved and filed. On May 30, 1881, Mr. Myers filed a bill in equity against the defendant company, charging that they were proceeding without authority of law, and in excess of their powers, and praying for an injunction to restrain them from laying the switch in question on his land. After argument, the motion to continue the injunction was refused. Afterwards, on July 12, 1881, the counsel for the plaintiff filed these exceptions and this rule was granted. We shall first consider those matters of exception which, it is alleged, appear on the face of the proceedings, and afterwards inquire as to our authority and duty to overturn the adjudication involved in the approval of the bond for matters which do not appear of record. If, on the face of the proceedings, the approval of the bond was unauthorized, and, therefore, improvidently granted, we unquestionably have power to correct our error.

The first exception is, that the bond is not duly executed. It purports to be the bond of the Delaware, Lackawanna & Western Railroad Company, with two sureties, and to be "sealed with their seals," and is thus executed on behalf of the company:

{ SEAL OF THE } "The Delaware, Lackawanna & Western Railroad
 { COMPANY. } Company, by Sam'l Sloan, President."

The want of a formal attestation at the end of the instrument, of the seal of the company and the signature of the president, does not make it any the less the bond of the company. These may be proved otherwise, as they have admittedly been proved in this proceeding, by the agreed testimony of Mr. Sloan. In a suit on the bond, the proof of the handwriting of the president, taken in connection with the recital in the body of the instrument of its sealing, would be sufficient for the jury to conclude that the seal was affixed by him. (See *Long v. Ramsay*, 1 S. & R. 72; *Miller v. Binder*, 4 C. 489.) The most that can be said then is, that the bond in its execution is informal, not that it is invalid. Objection on the ground of such informality ought to have been made at the time of its presentation. After this lapse of time the objection comes too late.

The fourth exception is, that no authority from the company defendant, is shown for the filing of the bond. This is to be presumed in the first instance from the execution and presentation of the bond, and after the corporation proceeds under it to take the land they will be estopped from denying the authority under which it was filed.

The second exception is, that the filing such bond is not authorized by law. The Lackawanna & Bloomsburg Railroad Company was incorporated by act of April 5, 1852, P. L. 669. Amongst other powers it was granted "the right to build and construct branch or lateral roads not exceeding five miles in length in any case" (section 3). In June (17), 1873, in accordance with the provisions of the general statute, the above named corporation was merged in and consolidated with the Delaware, Lackawanna & Western Railroad Company, under the name of the latter company. Thereupon the consolidated companies, by operation of law as well as by virtue of their agreement, became possessed of all the rights, privileges, and franchises, and became subject to all the restrictions, disabilities, and duties of each. By the act of March 17, 1869, P. L. 12, P. D. 1222, pl. 46, it is made lawful for any railroad, canal and slack-water navigation company to straighten, widen, deepen, enlarge, and otherwise improve the whole or portions of their lines of railroads, etc., and make new feeders whenever the same may be necessary for the better securing the safety of persons and property, and increasing the facilities and capacity for the transportation of traffic thereon. No formal petition accompanied the presentation of the bond for approval, and we, therefore, must resort to the bond itself for evidence of the authority under which it is claimed to be filed. Taking this as the guide, we think it cannot be said that there is no authority in law for filing the bond. It may be questioned, possibly, whether the proposed appropriation of land as described in the bond is authorized by the act of 1869 last quoted. The term feeder in that act, and which is also used in the bond, appears to have reference to the powers conferred on canal and slack-water navigation companies. Neither its technical nor popular sense includes a side track, branch, or lateral railroad. But whether the bond is authorized by the act of 1869 or not

we need not decide. The act of 1852 authorizes the company to build branch and lateral roads not exceeding five miles in length. It is true this proposed improvement is called a switch, to serve as a feeder, but the whole context shows that these terms are not used in their technical sense, but were intended to cover a branch or side track, which the act authorizes them to build.

The third exception is, that the taking of land proposed is not such as is authorized by any law, and is expressly forbidden by the constitution. We dismiss this exception for two reasons: First, the illegality or unconstitutionality of the proposed appropriation of land does not appear on the face of the proceedings, but, if at all, from the testimony given on this rule. Admitting this to be a pertinent inquiry where a bond is presented for approval, upon which testimony may be presented, it follows that the exceptant has had his day in court, when he could have been heard; and the adjudication then made cannot be arbitrarily overturned without some proper reason for excusing his default addressed to the sound discretion of the court. But, second, we do not think this is the proper time and proceeding for the adjudication of these questions as to the abuse of its power by this corporation. The power to appropriate these lands, if it exists at all, flows, not from the filing and approval of the bond, but from the grant of the legislature. The giving and approving of the bond are conditions precedent to the exercise of the power, but, neither by the statute nor by the general course of judicial decision, have they been declared or held to be conclusive against the land owner, except as to those matters which are essential to the adjudication. *Wadhams v. L. & B. R. R.* 6 Wr. 303. The purpose of the act of April 9, 1856, P. L. 288, P. D. 1220, pl. 36, is clearly shown in *Dimmick v. Broadhead*, 25 Sm. 464, to have been to remedy the defect in the general railroad law of 1849, in not providing for adequately securing the owner of private property as required by the constitution. The proceeding prescribed by the act is well adapted to this purpose, but is not at all adapted to the decision of questions involving a determination of the abuse of its powers and franchises by a corporation. We have not been able to find a case in the state where questions such as are raised by these depositions have been decided on an applica-

tion for approval of the bond. To undertake to decide them here would seem to us an assumption by the court of a greater jurisdiction than was intended to be given by the statute under which the proceedings are had, and one which has not yet been exercised by the courts. This conclusion we understand to be in conformity with the uniform practice of this court. Since writing the above we have found a written opinion of Judge Conyngham to the same effect. *Von Storch v. D. & H. Canal Co.* 3 Luz. Leg. Obs. 368-374. In that case, as in this, a question was raised as to the power of the corporation to take land for the purpose proposed, it being alleged by way of exception to the bond tendered, that the corporation was proceeding in excess of its powers. Judge Conyngham said: "We do not see that at this time and upon this hearing the court can enquire into the particular object of the proposed road, upon the common conversation or opinion even of agents of the company. If the company have no right to make the road they will be trespassers as much after the filing the bond as before."

The rule is discharged.

Court of Common Pleas of Montgomery County.

COMMONWEALTH v. BEENER *et al.*

Butchers having meat stores apart from their slaughter house premises are liable to assessment.

Appeals from the assessment of the mercantile appraiser.

The opinion of the court was delivered October 6, 1884, by

BOYER, P. J.—The appellants are described in the appeals as butchers, having stores. Christian Beener has been twice assessed; once as a meat dealer, which is correct, for he has a meat store apart from his slaughter house, where he sells meat. He, therefore, does not come within the exemption of the act of February 27, 1868, providing for a manufacturer or mechanic not having a store or warehouse apart from his manufactory or workshop. For the selling of meat, although of his own killing, at

his store, he is, therefore, liable to assessment for a license. But as a "butcher," for selling meat at his slaughter house or in the market, of his own killing, he is not liable. One of said assessments, therefore, is ordered to be stricken from the list of the mercantile appraiser, the other to remain.

In the cases of the other two appellants, William Hildebrecht and J. W. Watson, who are assessed as butchers having meat stores apart from their slaughter houses, the assessments of the mercantile appraiser are sustained, and the appeals dismissed.

Court of Common Pleas of Luzerne County.

BAAB v. BRADER.

Certiorari.

Enough must appear on the record of the justice to show a cause of action within his jurisdiction.

The opinion of the court was delivered June 8, 1885, by

RICE, P. J.—While it is true that the justice need not state the evidence upon his record, still he must state "the kind of evidence upon which the plaintiff's demand may be founded, whether upon bond, note, penal or single bill, writing obligatory, book-debt, damages on assumption, or whatever it may be." Enough, at all events, must appear to show a demand based on a cause of action within the jurisdiction of the justice. Where this appears it will be presumed that his judgment was founded on legal proof, but if this does not appear no presumption is allowed to cure the defect or to supply the omission. In deciding whether the record is defective in this particular, the court will not apply the strict rules of special pleading, nor overturn the judgment by mere verbal criticism. The courts do require, however, reasonable certainty in the statement of the demand, and in this respect, we think, this record is fatally defective. (See *Bennett v. R. R. Co.*, 7 Phila. 11.)

The exceptions are sustained and the judgment reversed.

THE LUZERNE LEGAL REGISTER.

VOL. XIV. FRIDAY, SEPTEMBER 4, 1885.

No. 36

Court of Common Pleas of Luzerne County.

LORD v. BREZEE *et al.*

Judgments, opening of, delay—Contracts, duress, fraud, ratification.

1. To constitute duress at law, the arrest must have been originally illegal, or have become so by subsequent abuse of it.
2. Where a contract is only voidable or relatively void on the ground of fraud or duress practiced on the party, it may be ratified or affirmed.
3. "He who knowingly accepts and retains benefits under such a contract, or who uses the property acquired as his own, after the discovery of the fraud, or unduly delays claiming back his property or giving up what he received, affirms the validity of the contract." *Negley v. Lindsay*, 17 Sm. 227, followed.
4. Effect of delay in moving to open a confessed judgment procured by fraud or duress considered.
5. Where a motion to open a judgment has been delayed for a long time after knowledge of the defense, and the delay has been continued until witnesses have died or been disqualified, and the defense then set up rests chiefly on the testimony of the defendant, his testimony, in so far as it is in conflict with that of the other witnesses, ought to be scrutinized with very great care.

Rule to open judgment, etc.

The opinion of the court was delivered September 2, 1884, by RICE, P. J.—This confession of judgment was given while Joseph Brezee, the principal defendant, was under arrest on a criminal charge, preferred by Lewis Lord, the legal plaintiff. It does not appear that it was a felony or any of the crimes enumerated in sec. 10 of the act of March 31, 1860, and there is no evidence which would justify a jury in finding that he was guilty of any of those crimes. Therefore, whatever equities the defendants may have, it cannot be said that the confession is void because given to compound a felony or other crime, against the express prohibition of the statute. *Swope v. Jefferson Fire Ins.*

Co. 12 Nor. 251. Is it voidable on the ground of fraud or duress? According to the defendant's testimony he was guilty of no crime whatever, but, having been arrested, he was brought before the magistrate and there compelled to sign the note in controversy, or give excessive bail, or go to jail. According to the evidence adduced in behalf of the plaintiff, he was charged with having fraudulently induced the plaintiff to assign a judgment of three hundred dollars, which the latter owned, to one G. F. Van Tuyl. To constitute duress at law, the arrest must have been originally illegal, or have become so by subsequent abuse of it. *Stauffer v. Latshaw*, 2 W. 165. The burden of proving the arrest to have been originally illegal rests on the defendant, and it is argued that he has failed to prove this to have been the case. Admit that he was arrested by due process of law, and that, therefore, the arrest was originally legal. We are still not prepared to say that, if the case rested here, there is not such a conflict of evidence as to duress arising from a wrong use of the arrest against the defendant as to require us to submit the disputed questions of fact to a jury. This brings us to the question of ratification. At some stage of the proceedings before the magistrate, not necessary to determine now, a settlement was made which resulted in giving this note. In speaking of it we shall be guided by what we conclude to be the weight of the testimony. According to the testimony of Mr. Van Tuyl, who was produced by the defendant, the consideration for the assignment of the judgment owned by Lord to him was a book account which he, Van Tuyl, had against Brezee, and a horse and wagon which he, Van Tuyl, transferred to make up the difference between the amount of the book account and the face of the judgment assigned. We feel compelled to accept this version of the transaction as correct, notwithstanding it does not agree in several particulars with that given by the defendant. In the settlement Lord claimed from Brezee the face of the judgment assigned to Van Tuyl. Against this was allowed a certain balance due to Brezee from Lord for board and other items, and for the difference, amounting to two hundred and forty dollars, the present judgment was given. It was further agreed that Brezee should retain the horse and wagon. There being no proof to

the contrary, it is to be presumed that the assignment of the judgment to Van Tuyl was allowed to stand, and, for aught that appears, the full amount of the judgment was collectible. It expressly appears that Brezee retained the horse and wagon and subsequently sold the same. Further, this motion was not made until nearly five years had elapsed, and not until after two important witnesses to the transaction had died, and Lewis Lord, the legal plaintiff (and, according to Mr. Mosier's testimony, the beneficial plaintiff notwithstanding the assignment of record to Mosier), had been adjudged a lunatic. Thus, under the settlement, the defendant got the benefits accruing from the assignment of the judgment to Van Tuyl, and these do not seem, under all the evidence, to be a grossly unfair and inadequate consideration for the judgment in controversy. The defendant's evidence, in attempted explanation of his acts, in view of its disagreements with the other evidence in the case, and especially in view of his long delay in making this application for relief, does not, in our judgment, overcome the effect to be implied from them, or put it so seriously in question as to authorize us to open the judgment and submit it to a jury. We need not refer to the recent cases which declare it to be the duty of the court to weigh the evidence in applications of this kind, especially where it is that of the defendant alone, and to decide according to the preponderance thereof without awarding an issue. Where a contract is void on the ground of public policy, or is against a statute, or was procured by fraud involving a crime, a confirmation of it is affected with the original taint. *Negley v. Lindsey*, 17 Sm. 227. But under the later decisions in this state it is well settled that other contracts, though voidable or relatively void on the ground of fraud practiced on the party, may be ratified or affirmed. *Pearson v. Chapin*, 8 Wr. 9; *Seylar v. Carson*, 19 Sm. 81; *Shisler v. Vandike*, 11 Nor, 447-9; *Lauer's Appeal*, 12 W. N. C. 165; *Negley v. Lindsey*, *supra*. We see no substantial reason for distinguishing such a contract from one voidable on the ground of duress; and applying the principles of the cases cited to the facts of the case in hand, we conclude that the acts of the defendant in retaining and applying to his own use the fruits of the contract on which this judgment is based, taken together with his

long delay in moving to open the judgment, debar him from now asking equitable relief. In the case of *Negley v. Lindsay*, Mr. Justice Sharswood, in commenting on the case of *Pearsoll v. Chapin*, says: "It is there said that he who knowingly accepts and retains benefits under such a contract, or who uses the property acquired as his own, after the discovery of the fraud, or unduly delays claiming back his property or giving up what he received, affirms the validity of the contract." The law does not absolutely fix any period of time within which a defendant must move to open a confessed judgment procured by fraud or duress practiced upon him, but delay long persisted in after knowledge of all the facts always casts greater or less doubt on the *bona fides* of the defense set up, and gives weight to the evidence adduced to rebut it, and where it has been continued until witnesses have died or been disqualified and the defense then set up rests chiefly on the testimony of the defendant, his testimony, in so far as it is in conflict with that of other witnesses in the case, ought to be scrutinized with very great care. This, chiefly, is the effect which we have given to the fact in this case. On the argument of the case so much was said as to the evidence of conversations with one of the attorneys now appearing for the defendant, but who was not his attorney in this matter when they took place, that we feel called upon to say that the evidence, in our judgment, was clearly irrelevant and incompetent, and has not been taken into consideration by us in forming our conclusions.

The rule is discharged.

Littleton thus describes the villein service: Tenure in villeinage is most properly when a villein holdeth of his lord, to whom he is a villein, certain lands or tenements according to the custom of the mannor, or otherwise, at the will of the lord, and to do his lord villein service; as to carry and re-carry the dung of his lord out of the city, or out of his lord's mannor, unto the land of his lord, and to spread the same upon the land, and such like.

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Court of Common Pleas of Luzerne County.

LOWENSTEIN *v.* KELLER.

Landlord and tenant, proceedings under act of 1863—Injunction to restrain landlord from proceeding.

1. The act of 1863 provides a complete system for determining controversies between landlord and tenant.
2. It is competent to show in defense to proceedings to recover possession, that the defendant, being in possession under another landlord, was induced by fraud and misrepresentation to accept the lease upon which the proceedings are based.
3. An injunction at the suit of the landlord whose tenant has accepted a lease from another, will not lie to restrain the latter from proceeding on the lease to judgment.
4. *It seems*, however, that an injunction will lie to prevent such judgment from being used to put the rightful owner out of possession, and thus compelling him to bring ejectment to regain the same, especially if it is clearly proven that the tenant was induced by fraud to accept the lease proceeded upon.

Motion for preliminary injunction.

The opinion of the court was delivered September 3, 1883, by

RICE, P. J.—“The landlord and tenant act of 1863,” says Thompson, C. J., “provides an ample remedy whereby to recover the possession of leased premises where it is alleged that the term has expired. It is not a one-sided remedy, for it allows the defendant ample scope to allege and prove any legal defense he may have against the plaintiff's demand, with the right of review by appeal or *certiorari*. It is a complete system for that species of controversy.” Brown's Appeal, 16 Sm. 155. (See also Krueger *v.* Rutledge, 12 Luz. Leg. Reg. 189, and cases cited). The general rule that a tenant will not be permitted to dispute the title of his landlord is subject to exceptions. The foundation of the jurisdiction conferred upon justices of the

peace by the act of 1863 is the existence of a tenancy. But if it can be shown that Finnegan, being already in possession under a lease from Lowenstein, was induced by fraud and misrepresentation to accept the lease upon which Keller is now proceeding, it would amount to proof that there was no tenancy, which, according to the decisions, would be fatal to Keller's recovery, without going on to controvert his title or showing an outstanding title in another. *Koontz v. Hammond*, 12 Sm. 182, and cases cited. So also, if in a former suit between Keller and Finnegan there has been a conclusive adjudication against Keller's asserted right to recover possession upon the termination of the lease in question, that is matter of defense which Finnegan may plead in the proceedings now pending, and if either defense is made out it is to be presumed that the justice, upon whom the statute has conferred jurisdiction, will render judgment in Finnegan's favor. But as against Finnegan, it seems clear to us that Keller has a right to pursue the statutory remedy and to have these questions decided by the tribunal which the statute authorizes a landlord to appeal to. But a judgment in a proceeding to which Lowenstein is not and cannot be made a party, cannot affect his title nor right of possession, and whether Finnegan, his tenant, has acted in collusion with Keller, or whether, on the other hand, he was induced by fraud and misrepresentation to disavow Lowenstein's title by accepting a lease from Keller, it is possible that Lowenstein would have standing in a court of equity to prevent any judgment, which Keller may obtain against Finnegan in the proceedings now pending, from being used for the purpose of putting him, Lowenstein, out of the possession, and thus compelling him to bring ejectment to regain the same. We are not, however, to anticipate the judgment which the justice may enter, and whatever may be Lowenstein's equitable right to have its use restrained in case it should be against Finnegan, we think, for the reason stated, that the temporary injunction heretofore ordered is too broad. We have, therefore, concluded that it should be so modified as to permit the entering of such judgment by the justice as the law and evidence before him may require, but in case he should enter judgment against Finnegan to restrain any further proceedings on the same until further order.

The injunction heretofore awarded, but modified in accordance with the foregoing opinion, is continued until further order, without prejudice to the right of the defendant, upon filing his answer to the bill, to move to dissolve the same.

S. J. Strauss, Esq., for plaintiff.

James Mahon, Esq., for defendant.

Oscar Jewell Harvey was born in Wilkes-Barre, Pa., September 2, 1851. He is a descendant of Turner Harvey, an Englishman who lived in the reign of Henry VIII., and was a noted archer and warrior and a great favorite of King Henry. It is said of Turner Harvey that he was in his time the mightiest man with his bow in all England, or of any age; and it is added that at his death there was no man in England who could spring his bow. This bow was a family relic in the time of William Harvey, the emigrant, and remained with the English branch of the family. The great-grandson of Turner Harvey was William Harvey, of Taunton, England. He emigrated to America among the first colonists of Plymouth, and with sixteen others from that colony purchased from the Indians, for a peck of beans, certain lands, and founded the present town of Taunton, Mass. He was a representative in 1664 and for thirteen years afterwards. He had children, Thomas and Elizabeth. Elizabeth married a Harvey, an emigrant from England, and from this union and that of her brother Thomas sprang nearly all of the name in New England. John Harvey, a descendant of Thomas Harvey, died at Lyme, New London county, Conn., in 1705. He had settled in Lyme as early as 1682, having come from Essex county, Mass. He had served as a soldier in the great Narragansett fight, December 19, 1675, in which he was wounded. His son, John, received certain lands on account of his father's service in the battle. Benjamin Harvey, youngest son of John Harvey, jun., was a native of Lyme, where he was born July 28, 1722. His wife, Elizabeth, died in Lyme December 3, 1771, and in the fall of 1772 Benjamin Harvey emigrated to the Wyoming Valley with his children, Lois, Lucy, Benjamin, Silas, and Elisha, and settled

in the lower end of Plymouth township. His second wife was Catharine Draper, widow of Major Simeon Draper, of Kingston. They had no children. Major Draper was one of the early members of the Susquehanna Land Company, and one of the first Forty of Kingston. Mr. Harvey was a man of intelligence and possessed of considerable means (at the time of his death he was one of the richest men in the valley), and became prominent among the Wyoming settlers. Charles Miner, the historian, said of him: "He was esteemed one of the most considerate, prudent men among those who first established themselves in the valley. He was the intimate friend, and frequently the confidential adviser, of Colonel Zebulon Butler, they having formerly been neighbors (at Lyme, Conn.) He was often employed in situations of trust and delicacy, and his opinions were regarded with marked respect." He died in Plymouth November 27, 1795. One hundred years ago, and even seventy-five years ago, there were a great many Harveys in Lyme. They were all well-to-do, and owned a great deal of land. The family were connected by marriage with many of the prominent families of New London county—the Seldons, Colts, Waites (of which Chief Justice Waite, United States Supreme Court, is a descendant), Beckwiths (Rev. George Beckwith, one of the earliest ministers in Wyoming, was a descendant), Brockways, and Rathbones. There is now not one of the name of Harvey in Lyme. Benjamin Harvey, jun., son of Benjamin Harvey, was the first merchant in Plymouth. In 1774 he started a small retail store in the log house of his father, and located very near the site of the Christian church building. He was a soldier in Captain Robert Durkee's company of Wyoming Volunteers, attached to Colonel John Durkee's regiment of infantry in the American army. He died in service in March, 1777, an unmarried man. Silas, another son of Benjamin Harvey, sen., was killed in the battle and massacre of Wyoming. He was also unmarried. Elisha Harvey was the youngest son of Benjamin Harvey, sen. He married, in 1786, Rosanna Jameson, daughter of Robert and Agnes Jameson, who came to Wyoming from Voluntown, Windham county, Conn., in 1776. In December, 1780, he was made a prisoner by the Indians in one of their incursions into the valley, and con-

veyed to Canada. He was detained there until August, 1782, when he was enabled to return to his home. Exposure to the severe climate of Canada and harsh treatment by his captors, broke down his constitution, and eventually caused his death, which occurred in Plymouth township March 14, 1800, at the age of forty-two. The Wilkes-Barre *Gazette* of March 18, 1800, in referring to his death said, *inter alia*: "For his uprightness, he lived much esteemed by all who knew him; and died not less lamented. Notwithstanding his agricultural pursuits forbid him to mix so much with men as some, yet his virtues were many and his exemplary conduct not less distinguishable * * and when called to bid adieu to sublunary enjoyments, he was resigned to the sleep of death, with the comfortable hope of awakening among the blest of God." His second son, Jameson Harvey, was born January 1, 1796, and died July 4, 1885. He was the father of our townsmen William Jameson Harvey and Henry Harrison Harvey. Benjamin Harvey, eldest son of Elisha Harvey, was born May, 9, 1792, and married, July 9, 1815, Sally, daughter of Abram Nesbitt, of Plymouth township. He was the son of James Nesbitt, who emigrated from Connecticut in 1769, and was one of the Forty. His name appears on the list of settlers of the valley made out by Colonel Zebulon Butler on July 24, 1769, and also upon a list prepared by Colonel Butler of the persons in the fort at Wilkes-Barre on April 12, 1770. He made his "pitch" at the foot of Ant Hill, Plymouth, where he resided with his family during the remainder of his life, and which was also the residence of his two sons, Abram and James, during their respective lives after him. He returned to Connecticut in 1774, on account of the Pennamite and Yankee troubles, but came back to Plymouth in 1777. From this period he remained on his farm to the time of his death, July 2, 1792. He was, therefore a resident of the town at the time of the Wyoming battle and massacre. He was in the Wyoming battle and one of the survivors of Captain Whittlesey's company. The name of James Nesbitt appears in the proceedings of several of the early town meetings of Plymouth. He was an officer of a meeting held December 6, 1779, and was also one of the justices of the county court on the organization of Luzerne county May

27, 1787. James Nesbitt, jun., a son of Abram and brother of Mrs. Harvey, was a member of the first board of directors of the Wyoming (National) Bank, and remained a member several years. In 1832 he was elected sheriff of Luzerne county, and in 1835 was a member of the legislature of Pennsylvania. Abram Nesbitt, of Kingston, is the son of James Nesbitt, jun. On the organization of the Second National Bank of Wilkes-Barre in 1863, he was elected a member of the board of directors, and has remained in that position since. In 1871 he was elected vice president of the bank, which office he held until 1877, when he was elected president, which office he now fills. He has been a director of the Central Poor District for about fifteen years, and treasurer most of the time. He has been a member of the borough council of Kingston about three-quarters of the time, and school director for about one-half of the time since the organization of the borough. He is one of the trustees of Wyoming Seminary, a director of the Wyoming Valley Coal Company, and trustee and treasurer of the Forty Fort Cemetery Association.

Of other children of Elisha Harvey, Sarah married the late Rev. George Lane, of the Methodist Episcopal Church, and Elizabeth married Thomas Pringle, of Kingston, father of the late Alexander J. Pringle, of Kingston. Benjamin Harvey, in the spring of 1816, moved from Plymouth to Huntington township, in this county, where he owned a large tract of land and a grist mill. Here he lived the balance of his life a prosperous and wealthy farmer and man of business. He died in 1873 at the age of eighty-one years, respected and beloved by all who knew him.

Elisha B. Harvey, son of Benjamin Harvey, and father of Oscar J. Harvey, was born in Huntington township, at what is now Harveyville, October 1, 1819. He remained at home until the fall of 1837, when he entered the grammar school connected with Dickinson College, Carlisle, Pa. He remained there nearly a year, and then became a student in the Franklin Academy, near Harford, Susquehanna county, Pa. Among his fellow-students at this academy were several who in later life became men of prominence—Galusha A. Grow, Charles R. Buckalew, Thomas Bowman, D. D., LL. D., and others. Subsequently he entered

the academy of "Deacon" Dana in Wilkes-Barre, and early in August, 1841, at the age of twenty-two, he entered the freshman class of Wesleyan University, Middletown, Conn., in which institution his cousin, Harvey B. Lane, was at that time professor of Latin and Greek. Among his fellow-students and most intimate friends in college were several young men who afterwards attained eminence in the world: E. O. Haven, bishop of the Methodist Episcopal Church, and his cousin, Rev. Gilbert Haven, author and editor; James Strong, D. D., professor in Drew Theological Seminary and author of "Harmony of the Gospels," etc.; Hon. Dexter R. Wright, of Connecticut; Hon. Cornelius Cole, United States senator from California, 1867 to 1873; Orange Judd, of New York; and Professor Alexander Winchell, the scientist. Mr. Harvey was a faithful and energetic student and graduated from the university with honor in the summer of 1845. In September, 1845, he became professor of Greek and Latin in the Wyoming Seminary, Kingston, Pa., then in the second year of its existence. At that time Rev. Reuben Nelson was principal, W. W. Ketcham, subsequently a prominent member of the Luzerne county bar, and later a United States district judge, was professor of mathematics, and among the students who recited to Professor Harvey were several young men who afterwards became well-known citizens of Luzerne county and of the state of Pennsylvania; Henry M. Hoyt, ex-governor of Pennsylvania, being among the number. During the period of his connection with the Seminary Mr. Harvey was registered as a student at law in the office of Charles Denison, and when not engaged with the duties of his professorship he devoted his time to the study of Blackstone. In June, 1846, he resigned his position in the seminary, and soon thereafter entering in earnest on the study of the law, was admitted to the bar of Luzerne county November 4, 1847. While Mr. Harvey's profession was the law, and in it he worked for nearly twenty-five years, achieving much success, yet, from the start, he was almost continually interested and engaged in certain other duties and pursuits which occupied much of his time. From early youth up he had a great fondness for military affairs. When only twenty years of age he was elected captain of the Huntington

Rifle Company, and at the age of twenty-nine he was elected and commissioned, for the term of five years, lieutenant-colonel in the Pennsylvania Militia, and at the age of thirty-four years he was elected and commissioned brigade inspector of the Second Brigade, Ninth Division, Pennsylvania Militia, for the term of five years. In May, 1855, a military company was organized in Wilkes-Barre on the basis of the old "Wyoming Artillerists," and bore the same name. Elisha B. Harvey was elected captain and commissioned for a term of five years. He held the offices and performed the duties of brigade inspector and captain of the "Wyoming Artillerists" until July, 1859, when he was elected major general of the Ninth Division Pennsylvania Militia. The following October the election was contested, and because of certain irregularities it was decided that Mr. Harvey had not received a sufficient number of legal votes to elect him. The election was therefore declared void. On April 22, 1861, Mr. Harvey began the formation of a company of infantry to be called the "Wilkes-Barre Guard." Eighty-seven men were soon enlisted, and they offered their services to the state government, but were not accepted, as the quota had been filled prior to the time their services had been offered. In May, 1861, Captain Harvey recruited another company under the name of the "Wyoming Bank Infantry," and on June 13, they left Wilkes-Barre for West Chester, Pa., where, on June 26, the Seventh Regiment of the Reserve Corps was organized with three companies from Philadelphia, two each from Cumberland and Lebanon counties, one each from Perry and Clinton counties, and Captain Harvey's company from Luzerne county. Mr. Harvey was elected colonel of the regiment, his competitor for the office being Captain R. M. Henderson, of Carlisle, who was a prominent member of the bar of Cumberland county, and is now president judge of the Twelfth judicial district of Pennsylvania. The regiment remained at Camp Wayne until the battle of Bull Run was fought, at which time a requisition was made by the national government on the state of Pennsylvania for the immediate service of its "Reserve Corps." The regiment left West Chester July, 22, 1861, for Washington via Harrisburg and Baltimore, and five days afterwards the officers and men were mustered into

the service of the United States and became a part of the Army of the Potomac. Their first experience of active service was at Great Falls, on the Potomac above Washington, where they did picket duty for two weeks, the skirmishers of the regiment being face to face with, and in close proximity to, those of the enemy. On September 9, 1861, the regiment removed to Tenallytown, near Washington, and on October 9, following, advanced from Tenallytown into Virginia, where it was made the right of the Army of the Potomac, which position it held until the close of the Peninsular campaign. Soon after this they went into winter quarters at Camp Pierpont, Va. Colonel Harvey remained in camp with his regiment during the winter of 1861-62, and the succeeding spring worked diligently and persistently to bring his command up to the highest standard in drill and discipline. The first great conflict (Mechanicsville) in the Seven Days' Battle before Richmond, fell upon the Reserves, who, almost single handed braved the torrent of the attack. General McCall, in his official report of the battle, said, "I dispatched the Seventh Regiment, Colonel Harvey, to the extreme left, apprehending that the enemy might attempt to turn that flank. Here they maintained their position, and sustained their character for steadiness in fine style, never retiring one foot during a severe struggle with some of the very best troops of the enemy fighting under the direction of their most distinguished general [R. E. Lee]. In the battles at Gaine's Mill, Charles City Cross Roads, and Malvern Hill, Colonel Harvey's command fought with a determination and bravery unsurpassed, the flower of the regiment being cut down in these sanguinary struggles." The regiment numbered eight hundred and sixty-three men when it went into the Seven Days' conflict, and three hundred and fifty-three when it came out of the last battle. The hardships during this week of battles have rarely been exceeded, and at the close Colonel Harvey found himself completely prostrated. He had been bruised on the shoulder by a piece of an exploding shell, struck on the neck by a spent minie-ball, and severely bruised and injured by being thrown to the ground by the runaway horses of an artillery caisson. In addition to these injuries he had an attack of rheumatism of such a type as to preclude further service in the field.

Consequently, July 4, 1862, he tendered his resignation, which was accepted, and he was "honorably discharged from the military service of the United States." Colonel Harvey's interest in military matters was only exceeded by the interest he took in educational affairs. His connection with the Wyoming Seminary has already been referred to. In 1849 he was elected secretary of the school board of Wilkes-Barre borough, and from that time until he entered the army he was, as secretary and director, closely identified with, and deeply interested in, the public schools of the town. He was one of the incorporators of the Wilkes-Barre Female Institute, established in 1854, and a member of its first board of trustees. In 1863 he opened a "Classical and Mathematical Institute," for both sexes, which was kept open until 1869. He was also more or less in public life. In 1849 and 1850 he was chairman of the Luzerne county committee of the democratic-whig party, and in August, 1850, he presided over the county convention of that party, and was nominated for the state legislature. At the same time L. D. Shoemaker was nominated for the office of district attorney, G. W. Palmer for sheriff, and Henry M. Fuller for congress; but at the election in October Messrs. Palmer and Fuller were the only successful ones of the four candidates. The same year he was deputy attorney general for Luzerne county. In 1854 he was elected as the candidate of the whig party register of wills of Luzerne county for the term of three years. From 1850 to 1861 he was clerk of the Wilkes-Barre borough council; from 1852 to 1860 collector of taxes of Wilkes-Barre borough; from 1857 to 1860 clerk of the markets and sealer of weights and measures for the same borough; and from 1856 to 1861 chief of police of the borough of Wilkes-Barre. In May, 1865, Colonel Harvey was elected burgess of Wilkes-Barre. In 1866 he was elected a justice of the peace for the First ward of Wilkes-Barre for the term of five years, and in 1871 he was elected to serve a second term. When Wilkes-Barre was incorporated into a city he became, by virtue of his office, alderman of the Fourth ward of the city. At the charter election for city officers in June, 1871, he was a candidate for the mayoralty. His opponent was Ira M. Kirkendall (a democrat), who was elected. Mr. Harvey was one

of the corporators, for a long time secretary and treasurer, and ultimately sequestrator, of the Wilkes-Barre and Providence Plank Road Company. From 1859 to 1861 he was one of the directors of the Wyoming Bank, at Wilkes-Barre. He was an active member of the Pennsylvania State Agricultural Society, the Luzerne county Agricultural Society, the Wyoming Historical and Geological Society, the Wilkes-Barre Law and Library Association, and before the days of a paid fire department, was president and an active member of one of the Wilkes-Barre fire companies. He was also for many years a local preacher of the Methodist Episcopal Church. Colonel Harvey died at his home in Wilkes-Barre, August 20, 1872, after a long and tedious illness—the result of over work and nervous prostration—and was buried in Hollenback Cemetery with military and Masonic honors.

Mr. Harvey was twice married. The first time October 8, 1845, to Phebe Maria Frisbie, a daughter of Chauncey Frisbie, of Orwell, Bradford county, Pa. She died at Wilkes-Barre, June 7, 1849, leaving only one child, Olin Frisbie Harvey, M. D. Mr. Frisbie was born November 16, 1787, at Burlington, Hartford county, Conn., and was a son of Levi and Phebe (*Gaylord*) Frisbie. Phebe Gaylord was a daughter of Lieutenant Asher Gaylord, slain in the battle and massacre of Wyoming. Chauncey Frisbie was at one time treasurer of Bradford county, also postmaster at Orwell, and held various positions of trust. His eldest son, Hanson Z. Frisbie, studied law with Colonel Harvey, and was admitted to the bar of Luzerne county August 5, 1850. He now resides at Grantville, Kan. Colonel Harvey's second wife, whom he married July 8, 1850, was Sarah Maria Garretson, a native of Readington, Hunterdon county, N. J. She was the eldest child of Stephen and Mary Ann (*Urquhart*) Garretson. Mrs. Garretson is still living. She was born October 31, 1797, at Readington, and was the eldest child of George and Sarah (*Pittenger*) Urquhart. George Urquhart was born in Scotland January 17, 1767, and came to America in 1786. He was for nearly his whole lifetime a school teacher. Captain John Urquhart, father of George Urquhart, M. D., of this city, and Samuel A. Urquhart of Pittston, was the second child of George Urqu-

hart. Mrs. Harvey died in this city August 21, 1875. [For the material facts connected with the Harvey family we are indebted to advance sheets of "History of Lodge No. 61, F. and A. M.," by Oscar J. Harvey, now in press.]

Oscar J. Harvey was prepared for college by his father in his Classical and Mathematical Institute, and for the year preceding his entering college was an assistant teacher in the school. He entered the freshman class of La Fayette College in September, 1867, a few days after his sixteenth birthday, and graduated B. A. in 1871, and was at that time elected historian of his class for life. In 1874 he received the degree of A. M. After graduation Mr. Harvey returned to Wilkes-Barre and spent the ensuing year in his father's office as clerk. In July, 1872, he was elected professor of mathematics and higher English in the Wyoming Seminary, at Kingston, and in September following entered upon his duties. He remained in the institution until July, 1873, when he resigned the position. He then entered the law office of Wright (C. E.) and Hand (I. P.), and in October, 1875, passed his examination for admission to the bar. C. E. Rice, W. S. McLean, and J. Vaughan Darling being the examining committee. The court not being in session he could not be admitted at the time, and on November 6, he started on a trip through Europe for travel and study. He returned home in May, 1876, and was admitted to the bar of Luzerne county May 16, 1876. Mr. Harvey founded, in 1872, at La Fayette College, "The Harvey Prize for English," an annual prize of twenty dollars in gold to the student of the junior class excelling in the English studies of the year. He also contributed a collection of valuable books to the college library, and was recording secretary of the Alumni Association from 1874 to 1882. Upon the organization of the Wilkes-Barre Fencibles, November 28, 1878, Mr. Harvey was elected captain, and the Fencibles became Company B of the Ninth Regiment of the National Guard of Pennsylvania. Captain Harvey remained in command of the company till October 17, 1879, when he became commissary of the regiment. He continued in this position until July 11, 1881, when he was discharged under an act of the legislature of the state, cutting off all commissaries and paymasters in the National Guard of Penn-

sylvania. Mr. Harvey has contributed articles to the *Keynote*, a leading journal of New York City, devoted to dramatic and musical matters, to the *Magazine of American History*, and other publications. He is the author of "A History of Lodge No. 61, F. and A. M., Wilkesbarré," 8vo., 375 pp., eleven portraits (engravings and photographs) and ten wood-cuts, now in press. Mr. Harvey has been secretary of the Mechanics' Loan and Savings Association of Luzerne county since 1872, and director of the Masonic Benefit Association since 1879. He is also a member of the Wyoming Historical and Geological Society, and a counsellor of the American Institute of Civics, of which Chief Justice Waite, of the United States Supreme Court, is president. Mr. Harvey married, June 23, 1880, Fannie Virginia Holding, of West Chester, Pa., daughter of Eben B. and Martha P. (Smith) Holding. Mr. Holding was born near Smyrna, Del., and was the son of Richard and Elizabeth (Tillen) Holding, of Queen Anne county, Md. Mrs. Harvey has two brothers, Samuel H. Holding, the elder of whom, is assistant solicitor of the Cincinnati, Cleveland, Columbus, and Indianapolis Railroad Company at Cleveland, O.; and the other, G. A. McC. Holding, is the law partner of R. E. Monaghan, of West Chester. Mr. and Mrs. Harvey have three children: Thorndyke Harvey, Ethel Harvey, and Helen Harvey, the latter two being twins. Circumstances have lured Mr. Harvey from the practice of his profession to other pursuits, probably more congenial to his nature, and possibly more profitable. He now occupies the post of chief of a division in the office of the third auditor of the United States treasury department. The office has a fair salary attached and the duties are important, and of a character Mr. Harvey's legal training and general business acquirements give him special fitness for. He has been a republican, though of late years not very positively of that faith, and his appointment under these circumstances was made in accordance with the pledge of President Cleveland, given at the time of his inauguration, to preserve, as far as possible, the so-called non-political offices from partisanism. Mr. Harvey has a decided leaning to literary endeavor, and in several magazine articles on various topics, principally of a historical order, has evinced considerable literary ability. His

diction is clear and pleasing, his reasoning forcible, and his facts are carefully collated and substantiated. He is at present engaged in the preparation of a history, to be published, when completed, in book form, of Lodge No. 61, F. and A. M., of this city, one of the oldest Masonic organizations in this part of Pennsylvania, and whose membership has, from time to time, included a large majority of the distinguished men of the Wyoming Valley, not a few of whom have reached to enviable state and national reputations. There is not much doubt but, had he chosen to apply himself assiduously to the practice of the law, he might have achieved both a good income and a fair distinction thereat.

Thomas Henry Atherton was born in the township of Kingston, county of Luzerne, Pa., July 14, 1853. He is a descendant of Robert Henry, who emigrated with his brother James from Coleraine, Ireland, and settled on Doe Run, Chester county, Pa., in 1722. Their ancestors were natives of Scotland. James died young, leaving one child, who died in infancy, and Robert removed to Virginia after his marriage to Mary A. Davis, of Chester county. John Henry, son of Robert Henry, married Elizabeth Devinny, a daughter of Hugh Devinny, who came to Pennsylvania in 1723, and settled in Chester county. John Henry died in 1744, and his wife Elizabeth in 1778, at Lancaster, Pa. William Henry, eldest son of John Henry, was born in Chester county, May 29, 1729, and after the death of his father was apprenticed to Matthew Rocser a gunmaker in Lancaster. Of his early youth but little is known. He possessed a mind strong in its powers by nature, and while prevented by circumstances from obtaining a thorough scholastic education, he was still ardently bent on the acquisition of knowledge. Soon after the expiration of his apprenticeship, in 1750, he commenced business on his own account in Lancaster. Upon the breaking out of the Indian War in the summer of 1754, he was appointed armorer to the troops collected for Braddock's expedition, and was ordered to Virginia. (Pittsburgh was then claimed to be in Virginia.) After the defeat of the expedition he returned to

Lancaster, where he, as appears in a letter from Colonel Chap- ham to Governor Morris, delivered two hundred stand of arms for the use of the province. In 1756 he was married to Ann Wood, a native of Burlington, N. J. She proved to him a worthy helpmate during life, combining within herself every qualification to render him happy in his marriage relations. During the revolution she conceived the idea of making rag carpets. This she carried out by making the first one in the provinces or elsewhere. The war had rendered the luxury of a carpet almost out of the question, and this invention tended to supply the place of the imported article. In the year 1757 Mr. Henry, as contracting armorer, was again called to Virginia, to the army concentrating there upon the second outbreak of the Indian War in that part of the colonies. After the campaign he returned to Lancaster, where, in addition to the manufacture of arms, he, in 1759, entered into partnership with Joseph Simon in the iron and hardware business. In 1760 Mr. Henry sailed for England on business for his firm; was shipwrecked in the Bay of Biscay, and it was nine months from the time of his leaving home until his arrival in England. Soon after his marriage the introduction of Benjamin West to him took place under the following circumstances, and we advert to this pleasing incident in the life of William Henry with peculiar pleasure, as its relation will disclose the character in a considerable degree of his appreciation of the fine arts and his desire to encourage talent: West, who was born October 10, 1738, was at the time this acquaintance took place (1756) about eighteen years of age and was apprentice to a tinsmith of Lancaster named Metzger. Mr. Henry observed him chalking figures on a board fence as he was passing, and was led to enter into conversation with him. West confessed that he desired to have paints and brushes to exercise his favorite art. Thereupon Mr. Henry visited him at his house and soon provided him with these requisites, and during his leisure hours he, in a short time, had made such progress that he was induced to paint the portraits of both Mr. and Mrs. Henry. After having painted a few other portraits, Mr. Henry suggested to him the propriety of devoting his talent to historical subjects, and in a conversation mentioned the death of

Socrates as affording one of the best topics for illustrating the moral effect of the art of painting. The young artist knew nothing of the history of the great philosopher, and upon confessing his ignorance Mr. Henry went to his library and took down from one of its shelves a volume of Rollin's Ancient History (not Plutarch's Lives, as stated by Galt in his Life of West). The frontispiece of one of the volumes contains an engraving representing a slave in the act of handing the cup of poison to Socrates. (This identical volume is now in the possession of James Henry, of Nazareth). West commenced the painting on a canvass thirty by forty-five inches, but having never yet painted nude or semi-nude figures, he represented the difficulty to his patron, whereupon one of Mr. Henry's workmen was sent to him for a model. West's second picture was a landscape, which was also presented to Mr. Henry. That West always cherished the most grateful remembrance towards Mr. Henry is known, and that this friendship was reciprocated is evident from the fact that Mr. Henry named his youngest son, who in riper years also became a painter of considerable merit, after Benjamin West. In the year 1758 William Henry was commissioned a justice of the peace in and for Lancaster county, and was in that capacity indefatigably engaged when the murder of the Indians by the "Paxton Boys" took place, in December of 1763. Mr. Henry was elected a member of the American Philosophical Society March 20, 1767 (on which day David Rittenhouse was likewise elected), but never applied for his certificate of membership before 1784. It is signed by Benjamin Franklin as president, and Samuel Vaughan, William White, and John Ewing. It is pleasant to note the progress of such a man as William Henry from the humble gunmaker's apprentice to membership in the Philosophical Society, and to the wise and sanguine plans of the statesman, to which he was called subsequent to this period. He rose by force of his native genius. Obstacles served only to rouse his latent strength. Considerable facility to improve his mind was afforded him by having access to the books of one of the first libraries established in the provinces. For many years the library was kept in Mr. Henry's house. In the year 1768 Mr. Henry invented a machine, an account of which will

be found in the Philosophical Society's transactions, Vol. I., p. 350, and also in the *Pennsylvania Gazette*, July 7, 1768: "A description of a self-moving or sentinel register, invented by William Henry, of Lancaster, and by him communicated to the American Society, held at Philadelphia, for promoting useful knowledge."

If not the first, Pennsylvania was one of the first of the colonies to engage in the great system of public improvements. She merits unquestionably the credit of having attempted the *first canal*. Already in 1762 it was proposed to connect the waters of the Ohio with those of the Delaware, and as a part of the plan, in 1771, the assembly took into consideration that great advantages must accrue to the trade of the province in case an inland navigation could be effected between the branches of the rivers Susquehanna, Schuylkill, and Lehigh. The assembly appointed John Sellers, Benjamin Lightfoot, and Joseph Elliot a commission "to examine the different branches of said rivers lying nearest to each other, to measure by the most direct course and distances between them, to observe the soil and other circumstances in the intermediate country and report how far the said waters are or may be navigable up the branches thereof, and whether the opening or communication between them for the purposes of navigation or land carriage be practicable, etc., etc." On September 24, 1771, the commission reported to assembly. Benjamin Lightfoot resigned and William Henry was appointed in his place. On January 13, 1772, Samuel Rhodes and Samuel Lukens were added to the commission, and two weeks later David Rittenhouse. They reported to assembly January 30, 1773. Mr. Henry's name is appended to the non-importation paper passed by merchants of Philadelphia in October of 1765. At this early stage of the controversy between Great Britain and her American colonies, Mr. Henry warmly espoused the cause of his country. His inventive genius developed itself more and more. The sentinel register was followed in 1771 by the invention of the screw auger. A description of this was prepared by his second son, John Joseph Henry, for a number of years president judge of Lancaster, York and Dauphin counties, for Rees' Encyclopedia, to be found under head of Auger. On October 12, 1776, he was elected a member of assembly from Lancas-

ter county. Among the committees on which he served were: One to draught instructions to delegates in congress, and one for a militia law. Mr. Henry's election to the assembly may be considered his entry into public life. On September 3, 1776, he was appointed a justice of the peace by the legislature of Pennsylvania, and in October following appointed to hear and determine and discharge the prisoners in the county jail who were suspected of being inimical to the revolution. In March, 1776, he was ordered to manufacture two hundred rifles for Pennsylvania. His workmen were exempted from draft so long as they continued in his employ. In 1777 he was elected treasurer of Lancaster county, and held the office until his death in 1786. When the news reached Lancaster of the treaty between France and the United States (1778) William Henry personally paid for the illumination of the town in honor of the event. During the revolution he also held the office of commissary, under Washington's order, in 1777, collected blankets, shoes, stockings and clothing for the use of the army. There are extant several letters of Washington to William Henry, as well as one from the secretary of war, desiring him to purchase a pair of horses for the family coach of Washington. A few days previous to the occupation of Philadelphia by General Howe, September 26, 1777, congress removed to Lancaster, as well as the assembly. David Rittenhouse, state treasurer, removed his office to the house of Mr. Henry, where it remained until the evacuation of the city. Thomas Paine, the political and deistical writer, roomed in Mr. Henry's house in 1778. Of him William Henry, jun., has left record that he occupied the second story room; that he had often seen him sitting in an arm chair before a table covered with writing materials (he was then writing the "Crisis"); there used to stand on the table a bottle of gin, and pitcher and tumbler; his habits were disgusting to every member of the family, but my father said that his writings had a great effect on the war by urging the inhabitants of the colonies to oppose Great Britain; he was very slovenly and dirty in his dress; some days he did not write more than a line or two; as soon as my father found out his opinions on religion, he did not encourage him to remain in his house; a coldness sprung up and he finally left.

Among those antecedent to Fitch or Fulton in the application of steam as the motive power to propel boats, was William Henry. See *Life of John Fitch*, p. 138, published in Philadelphia, 1857, for Fitch's visit to William Henry, who told him that "he himself had thought of steam as early as 1776, and had held some conversation with Andrew Ellicot on the subject, and that Thomas Paine, in 1778, had suggested it to him, but he never did anything in the matter further than drawing some plans and inventing a steam wheel, which he showed Mr. Fitch, and said that as he (Fitch) had first published the plan to the world, he would lay no claim to the invention, etc." On page 170 it is also stated "that it was declared that Thomas Paine, in 1778, and William Henry afterwards, had suggested the plan of applying steam to the verge of a wheel as the method of producing a motive power." The original drawings made in 1779 by William Henry, were found among his papers after his death.

The German traveler, Schoepff, who traveled through the United States in 1784 and 1785, visited Lancaster and called on William Henry. See Vol. II., p. 21: "Another talented and worthy gentleman, named William Henry, I became acquainted with. Among other notable and ingenious things shown me by Mr. Henry was a small machine of which he was the inventor. An agreeable conversation between us as to the practicability of constructing a machine that would move forward against wind and tide, gave occasion to its production to me. The machine is very simple and, apparently, will answer the purpose very well. A tin verge such as are made use of in windows for the purpose of ventilation, has attached to its axis a spindle of about six inches in length, etc. Mr. Henry said that he could make *another machine which, if applied to a boat*, must move it forward against the current. This machine he is, however, not willing to describe at present. He is confident that its use will, in a great degree, assist the propelling of boats up the Mississippi and Ohio rivers, etc." And again: "I omit to mention other magnetic and electrical experiments which occupy Mr. Henry's leisure hours in an agreeable and useful manner, all of which indicate him to be a gentleman of refined mind and deep study."

In the transactions of the American Philosophical Society, March 20, 1785, we find: "The society received from William

Henry, of Lancaster, the following piece of mechanism and other curiosities, communicated by David Rittenhouse: The model of a wheel carriage, which rolls close in against the wind by wind force; two pieces of crystal of unusual magnitude, found in Lancaster county; an exceeding large tusk and one of the grinders of some unknown animal from Ohio." The model and papers of Mr. Henry, deposited in the Philosophical Society, have long since disappeared from their archives.

John Fitch, in order of time, ranks after William Henry. Page 215, in *Life of Fitch*, says: "April, 1785, John Fitch conceived the idea of a steam boat." The plan of William Henry was made in 1779. Both Fitch and Fulton visited William Henry. By vote of assembly, October 16, 1784, he was elected a delegate to congress from Pennsylvania, and on the 29th of that month took his seat in that body. In the following year he was again elected. Congress convened in Trenton, N. J. The business before congress mainly related to the examination and adjustment of claims upon the United States. One of the committees on which he served was that of coinage. They reported: "First, that the money unit of the United States be one dollar; second, that the smallest coin be of copper, of which two hundred shall be one dollar; third, that the several pieces shall increase in a decimal value." A few weeks prior to his election to congress, August 19, 1784, he was appointed president judge of the Courts of Common Pleas and Quarter Sessions of Lancaster county. This appointment evinces that, notwithstanding that he had not made law a particular study, yet, having acquired an early fondness for reading and mental investigation, became well acquainted with the various branches of science and literature—thereby becoming possessed of an extensive fund of information. His knowledge of law was less scientific, but more practical and useful. During the session of congress of 1784, a deputation of Indians arrived at the seat of government (Trenton), among them a chief called "White Eyes." This chief formed the acquaintance of William Henry, and entertaining for him a peculiar affection, he proposed to cement the regard for him (customary among Indians) by an exchange of names. To this proposal Mr. Henry acceded, and the name of Henry is borne by his descendants to the present day (1885). A descendant, Rev. John

Henry Killbuck, late a graduate of the Moravian Theological Seminary, and at present laboring among the Moravian Indians in Canada, is about to organize a mission among the Indians of Alaska. The family were early converts of the Moravian Mission prior to the revolution, and have continued members of the church. For many years Mr. Henry was one of the most active and influential assistant burgesses of the borough of Lancaster. He was also commissary of the regiment of troops raised in Lancaster county in 1775, and which was destined to re-enforce Arnold at Boston. Mr. Henry, after a short illness, died in Lancaster, December 15, 1786, and is buried there in the Moravian graveyard. He caught cold whilst attending a session of congress in Trenton, and a rapid consumption was developed.

William Henry, son of William Henry, was born March 12, 1757, and when young was placed with Henry Albright, gunmaker, of Lititz, to learn the business, and remained with him until 1778, when he became of age. The same year he removed to the Moravian settlement, Christians Spring, near Nazareth, Pa., where he carried on the business of gunmaker until 1780, when he removed to Nazareth, and married Sabina Schropp. He resided in Nazareth until 1818, when he removed to Philadelphia, where he died April 21, 1821. His remains now repose in Woodland Cemetery. His wife died in Bethlehem May 8, 1848. On January 14, 1788, he was commissioned justice of the peace of Bethlehem district, Northampton county, as also on the same day a lay or associate judge of the Courts of Common Pleas and Quarter Sessions. These offices he held until 1814, and then resigned. In 1792 he was elected one of the electors for president and vice president of the United States, and had the honor of giving his vote to Washington, who was re-elected president of the United States. His duties as a justice of the peace and judge of Common Pleas he discharged with great fidelity during the insurrection in Northampton county in 1798, when the house or window taxes were about being collected. In 1798 he contracted with the state of Pennsylvania for two thousand muskets, and in 1809 with the United States, in company with his son, John Joseph, for ten thousand. He thereupon erected gun works at Bolton, near Nazareth, and in 1808 erected

a forge to manufacture refined bar iron, and on March 9, 1809, had the first bar of iron drawn out in Northampton county. The Marquis of Chastellux, who visited Nazareth in 1783, describes an elegant pair of pistols made by Mr. Henry.

William Henry, son of William Henry, and the father of Thomas Henry Atherton, was born at Nazareth, August 15, 1796, and died at his home in Wyoming May 22, 1878. He was educated at Nazareth Hall and in his early manhood he followed the occupation of his father—that of a gunsmith. During the early struggles encountered in the development of the Lackawanna valley Mr. Henry manifested indomitable pluck, perseverance and energy, backed by an unwavering faith in the rich mineral treasures that lined the hills and valleys, waiting for the magic touch of some strong arm to reveal them to the world. His first public appearance in the Lackawanna valley was in 1832 in connection with the "Susquehanna and Delaware Canal and Railroad Company," the design of which was the construction of a railroad from the Delaware to the Susquehanna, and of which Mr. Henry was elected treasurer. His frequent journeys through that section gave him an opportunity of ascertaining its mineral wealth, and he was the first to advocate the building of a town at what is now Scranton, even when the place presented a most uninviting aspect, and when the wolf and fox roamed unmolested through the forests where the city of Scranton now stands—and *history must always regard him as the real founder of Scranton*. The railroad enterprise met with no encouragement and was strongly opposed by the residents of the Susquehanna and Delaware valleys, who claimed it was an impossible task and a project not calculated to improve their social condition. Mr. Henry, undismayed by this unfriendly feeling, called a meeting of the friends of the road together at Easton in 1836 to devise a plan of action. His mind was full of the riches of his famed locality, and in his enthusiasm he related to the gentlemen present the boundless resources of the country described, and asserted that if an iron interest was awakened and once developed in the Lackawanna valley a large town would be built as well as the road. He assured those present that if the old furnace at Slocum Hollow could be reanimated and sustained for a few

years, it would call for more ample means of communication with the sea board, than that afforded by the lumbering stage coach. Notwithstanding the zeal with which he advocated this undertaking, it seemed so impractical at the time that the most experienced at the meeting (which lasted three days) shrank from it, and only one gentleman present, Edward Armstrong, fell in with Mr. Henry's views. Mr. Armstrong possessed considerable wealth and was a gentleman of great benevolence and courtesy, living on the Hudson. In the acquisition of land in the Lackawanna valley, or the erection of furnaces and forges upon it, he avowed himself ready to share with Mr. Henry any responsibility, profit or risk. During the spring and summer of 1839, Mr. Henry examined every rod of ground along the river from Pittston to Cobb's Gap to ascertain the most judicious location for the works. Under the wall of a rock cut in twain by the dash of the *Nay-aug*, a quarter of a mile above its mouth, favoring by its altitude the erection and feeding of a stack, a place was well chosen. It was but a few rods above the *debris* of Slocum's forge, and, like that earlier affair, enjoyed, within a stone's throw, every essential material for its construction and working. In March, 1840, Messrs. Henry and Armstrong purchased five hundred and three acres for eight thousand dollars, or about sixteen dollars per acre. The fairest farm in the valley, underveined with coal, had no opportunity of refusing the same surprising equivalent. Mr. Henry gave a draft at thirty days on Mr. Armstrong, in whom the title was to vest; before its maturity death came to Mr. Armstrong, almost unawares. He had imbued the enterprise, by his manly co-operation, with no vague friendship or faith, and his death at this time was regarded as especially disastrous to the interests of Slocum Hollow. His administrators, looking to nothing but a quick settlement of the estate, requested him to forfeit the contract without question or hesitancy. Thus baffled in a quarter little anticipated, Mr. Henry asked and obtained thirty days grace upon the non-accepted draft, hoping in the interim to find another shrewd capitalist able to advance the purchase money and willing to share in the affairs of the contemplated furnace. Colonel George W. Scranton and Selden T. Scranton, both of them of New

Jersey, the latter being the son-in-law of Mr. Henry, interested by the earnest and enthusiastic representations of Mr. Henry regarding the vast and varied resources of the Lackawanna valley, of which no knowledge had reached them before, proposed to add Sanford Grant, of Belvidere, to a party and visit Slocum Hollow. The journey from Belvidere to the present site of Scranton took one day and a half hard driving, and was well calculated to test the self reliance and vigor of the inexperienced mountaineer. The Drinker turnpike, stretching its weary length over Pocono mountain and morass, enlivened here and there by the arrowy trout brook or the start of the fawn, brought the party on August 19, 1840, to the half-opened thicket growing over the tract where now Judge Archbald's residence is seen. Securing their horses under the shade of a tree, the party, amazed at the simple wildness of a country where green acres were looked for in vain, moved down the bank of Roaring Brook to a body of coal, whose black edge showed the fury of the stream when sudden rains or thaws raised its waters along the narrow channel. None of the party except Mr. Henry had ever seen a coal bed before. Assisted by a pick, used and concealed by him weeks before, pieces of coal and iron ore were exhumed for the inspection of the party about to turn the minerals, sparkling amid the shrubs and wild flowers, to some more practical account. The obvious advantages of location, uniting water power with prospective wealth, were examined for half a day without seeing or being seen by a single person. At that time Slocum Hollow contained five dwelling houses, one school house, a grist mill and a ricketty saw mill. The exterior features of the Slocum property were anything but attractive, yet, after some question and hesitancy, it was purchased at the price already stipulated. Lackawanna valley achieved its thrift and fame from this comparatively trifling purchase of but yesterday, and Scranton dates its incipient inspirations toward acquiring for itself a place and a name from August, 1840. The company consisting of George W. Scranton, Selden T. Scranton, Sanford Grant, William Henry, and Philip H. Mattes, organizing under the firm name of Scranton, Grant and Company, began forthwith the construction of a furnace under the superintendency of Mr. Henry, whose family

immediately removed from Stroudsburg to Hyde Park, now a portion of the city of Scranton. On September 11 of the same year, the first day's work was done towards the erection of a blast furnace, and the place was called Harrison, in honor of General William Henry Harrison, then the candidate of the whig party for president of the United States. This name was afterwards dropped for that of Scranton, which was finally changed to Scranton. The various changes which have occurred since then are matters of almost contemporary history and it is unnecessary to reproduce them here. Scranton, from the few struggling huts of Slocum Hollow, has grown to be the third city of Pennsylvania, with a population of sixty thousand inhabitants, and is now the county seat of Lackawanna county, erected on a site that seemed little better than a wilderness to the pioneers. Mr. Henry retired from business several years before his death and removed to Wyoming, where his last days were spent. He was twice married, his first wife being Mary B. Albright, a sister of Joseph J. Albright, of Scranton. In this marriage he violated the Moravian custom of choosing wives by lot, one of the first breaches of that custom which has now become extinct. His children by that marriage were Reuben A. Henry, general auditor of the Delaware and Hudson Canal Company; William Henry, lieutenant colonel of the First New Jersey Volunteers during the late civil war; Joseph J. Henry, captain of the Ninth New Jersey Volunteers, the first commissioned officer killed in the assault upon Roanoke Island; Eugene T. Henry, for many years superintendent of the Oxford Iron Works, at Oxford, N. J.; Ellen Henry and Jane Henry, who married Selden T. Scranton and Charles Scranton, respectively. His second wife was Sarah Atherton, daughter of Elisha Atherton. The children by that marriage are Lydia Henry, wife of Rev. W. S. Stites, of the Wyoming Presbyterian church, and Thomas Atherton Henry, now, by an act of assembly passed by the legislature of Pennsylvania, March 15, 1871, Thomas Henry Atherton, the subject of this sketch. Elisha Atherton was a descendant of the Atherton family which originated in the town of Atherton, a short distance northwest of Manchester, England. Robert de Atherton lived there in the time of King John (1199-1216). He was the high

sheriff of the county of Lancashire, and held the manor of Atherton of the barons of Warrington. The descendants of this Robert still reside at the place named. The first of the family to come to this country was Humphrey Atherton, who was born at Atherton, in Lancashire, in 1609, and emigrated to Boston about 1635. He died September 17, 1661. He had twelve children. Humphrey Atherton was elected one of the deputies of the council of Boston in 1643, and re-elected several times subsequently. A captain of the militia of Dorchester; major, and finally, in 1661, a major general, of the colonial forces. On September 17, 1661, when returning from a muster and while crossing the Boston common, his horse became unmanageable, and he was thrown off and killed. In one of Longfellow's early dramatic productions the scene of which is laid in Boston, and his character the colonial governors and deputies of the time, this tragic end of General Atherton is described.

James Atherton, a great-grandson of Humphrey Atherton, was one of the original settlers at Wyoming, in 1763. The Delaware Indians, on October 14, of that year, rose upon the settlement at noonday, while engaged in the labors of the field, and massacred about thirty of the people in cold blood. Those who escaped ran to the adjacent plantations to apprise them of what had happened, and were the swift messengers of the painful intelligence to the houses of the settlement and the families of the slain. It was an hour of sad consternation. Having no arms even for self-defense, the people were compelled to seize upon such few of their effects as they could carry upon their shoulders, and fled to the mountains. As they turned back during their ascent to steal an occasional glance at the beautiful valley below, they beheld the savages driving their cattle away to their own towns, and plundering their houses of the goods that had been left. At nightfall the torch was applied, and the darkness that hung over the vale was illuminated by the lurid flames of their own dwellings—the abodes of happiness and peace in the morning. Hapless, indeed, was the condition of the fugitives. Their number amounted to several hundred, men, women, and children; the infant at the breast; the happy wife a few brief hours before, now a widow, in the midst of a group of orphans. The supplies,

both of provisions and clothing, which they had secured in the moment of their flight, were altogether inadequate to their wants. The chilly winds of autumn were howling with melancholy wail among the mountain pines, through which, over rivers and glens and fearful morasses, they were to thread their way sixty miles, to the nearest settlements on the Delaware, and thence back to their friends in Connecticut, a distance of two hundred and fifty miles. Notwithstanding the hardships they were compelled to encounter, and the deprivations under which they labored, many of them accomplished the journey in safety, while others, lost in the mazes of the swamps, were never heard of more. Undaunted, though his companions fell all around him by the merciless tomahawk, James Atherton returned to the valley in 1769. It is not now certainly known who was the first settler at the village of Kingston, but one of the first settlers of the township in the last named year settled within the limits of the borough, namely, James Atherton, who, with his sons, James Atherton, jun., Asahel Atherton, and Elisha Atherton, built the first log house, nearly opposite the site of the old academy on Main street. There the father resided to the time of his death in 1790. James Atherton, jun., was the son of James Atherton, sen., and his son, Elisha Atherton, was the father of Sarah Atherton, the wife of William Henry. Of the killed at Wyoming are Lieutenant Asahel Atherton and Jabez Atherton, who were probably sons or grandsons of James Atherton, sen. Caleb Atherton heads the list in Captain Ransom's company. His time of service was three years, from January 1, 1777, to 1780. The first wife of Elisha Atherton, and the mother of Mrs. Henry, was Zibia Perkins. She was the daughter of the late David Perkins, of Wyoming. He was the son of John Perkins, who came to Wyoming prior to 1773, and was one of the original purchasers from the Indians of lands in Wyoming. John Perkins was killed by the Indians while in his field on the flats opposite this city. Miner, in the *Hazleton Travellers*, printed in 1845, speaks thus of the Perkins family: "Among the instances of Indian barbarity the murder of John Perkins has been narrated. He was from Plainfield, Windham county, Conn. On the enlistment of the two independent companies, his eldest son, Aaron, then an active

young man of about twenty, enrolled his name in the list, and marched to camp under Durkee. Hence the family were objects of especial hatred to the enemy. Aaron Perkins continued in the army to the close of the war, having given his best days to the service of his country. David Perkins, the next brother, took charge of the family, and by great prudence and industry kept them together, and not only preserved the plantation, but enlarged it. * * * * * For a great number of years Mr. Perkins executed the duties of a magistrate to the general acceptance. A son of his held the commission of major in the United States army, and is still in the service. Numbers of his children are well married and settled around him, or not far distant. * * * David Perkins still lives, in the enjoyment of fine health and an easy fortune. Aaron, the old soldier, one of the extreme remnants of Ransom's and Durkee's men, broken with age and toil, you may yet see slowly pacing his brother's porch, or on a summer day taking his walk along those beautiful plains. If not enjoying much positive pleasure, he yet seems to suffer no pain. Linger yet, aged veteran! Ye winds blow kindly on him! Beam mildly on his path, thou radiant sun, that saw his father slaughtered, and must have witnessed the gallant soldier in many a noble conflict! Plenty surrounds him. Peace to his declining years! As a most interesting memorial of the past we love to look upon you. Justice prompts me to say that the family of Perkins stands among the foremost on the file of patriotic services and deep sufferings, and is entitled to gratitude and respect." At the time of the massacre Mr. Perkins' home at Wyoming was burned, and his wife and son David fled to Connecticut, but returned in the fall. The second wife of Elisha Atherton was Carolina Ann Ross Maffett, widow of Samuel Maffett. Eliza Ross Atherton, wife of Charles A. Miner, of this city, is their only child. Her mother died in August, 1885. Thomas H. Atherton was prepared for college at the academy in Wilkes-Barre, taught by W. S. Parsons, and at the Luzerne Presbyterial Institute, Wyoming, Pa., and entered the College of New Jersey at Princeton, from which he graduated in the class of 1874. He was the secretary of his class and obtained the prize on political science and constitutional

law. He studied law with Charles E. Rice, and was admitted to the bar of Luzerne county September 29, 1876. He is a director of the Vulcan Iron Works and also in the Second National Bank and People's Bank of Wilkes-Barre. He is a republican in politics, a presbyterian in religious belief, and is actively connected with sabbath school work. He married October 7, 1880, Melanie Parke, daughter of Rev. N. G. Parke, D. D., of Pittston. S. Max Parke, of the Luzerne bar, is her brother. Mr. and Mrs. Atherton have two children: Louise Parke Atherton and Thomas Henry Atherton.

Mr. Atherton, as will be seen from the foregoing, comes from a good family, inheriting from both progenitors the blood of some of the best men and women who have figured in the annals of our state and country. His disposition and practices, too, have done honor to this inheritance. No young man at the bar, or in any other business in Wilkes-Barre, stands higher as a citizen. Professionally, he is all that a man thus fortified and equipped may be expected to be. He has an honest love for the profession and an honest anxiety to win in it all those material rewards which do not involve a sacrifice of reputation and self respect. He chooses to follow the law in the view that the law was made, not to shield the wicked, but to subserve good ends only, and being, thus careful in the choice of his clients, as well as intelligent and pertinacious in the prosecution of their causes, he has achieved a standing of which many an older practitioner could afford to be proud. His sympathies have always been with the republican party, and though he has never been in any sense a politician, his name has been frequently canvassed when the question of a fit republican nominee for district attorney has come up for consideration. He is fairly well to do in the world and spends the most of the time spared from his business duties in his beautiful new home and with his interesting family and numerous family connections. He is educated and a diligent reader, always well posted on the current news of the day as well as in general literature, and therefore a pleasing companion and friend

E. E. Yordy has a few more Court Rules left.

BOOK NOTICES.

FEDERAL DECISIONS. Cases argued and determined in the Supreme, Circuit, and District Courts of the United States. Arranged by William G. Myer. Vol. IX., pp. 893. The Gilbert Book Company, St. Louis.

This volume has been upon our table for several weeks. It covers the single subject, "Conveyances," and like the preceding numbers of the series is, in fact, a treatise in which the judiciary speaks without the intervention of a text writer. The title naturally sub-divides itself into: 1st, Deeds; 2d, Mortgages of Real Estate; 3d, Railroad Mortgages; and 4th, Chattel Mortgages. The analysis of each sub-division is exhaustive. Railroad mortgages are fully considered in important cases under sub-titles. The powers of railroad companies to execute them; how far mortgages cover after acquired rolling stock and other property; the rights of bond and coupon holders, and methods of foreclosure—all receive a full share of attention. How first mortgages may be deftly wiped out by receiver's certificates, issued under decrees of the courts under pretense of protecting these very mortgages, and many other phases of this branch of the law, created, as it were, by non-legislating judges,—slight of hand performances that have astonished lawyers and demoralized laymen, are laid open to the gaze of all who would read running. The volume is interesting and up to the standard of its predecessors.

HOOTEN'S JUSTICE AND LEGAL GUIDE. Law relating to county and township officers in Pennsylvania. By F. C. Hooton, of the West Chester bar. 1 Vol. 8vo. 519 pages, price \$4.00. Philadelphia: Rees Welsh & Co.

This work is designed for magistrates, justices of the peace, and all county and township officers, also intended as a ready reference book for persons desiring to know the present law of Pennsylvania. It sets forth the duties of sheriffs, coroners, prothonotaries, recorders of deeds, registers of wills, county commissioners, county treasurers, county auditors, county surveyors, clerks of the court, district attorneys, justices of the peace, in both their civil and criminal jurisdiction, constables, police officers, supervisors, township auditors and town clerks.

THE LUZERNE LEGAL REGISTER.

VOL. XIV. FRIDAY, SEPTEMBER 18, 1885.

No. 38

Court of Quarter Sessions of Luzerne County.

IN RE ERECTION OF ADDITIONAL ELECTION DISTRICT IN HUNTINGTON TOWNSHIP.

Election districts, division of—Amendment.

1. The act of May 18, 1876, P. L. 178, applies not only to a general division of a township into election districts, but also to the creation of an additional district out of a part of one of the districts into which a township has already been divided.
2. The above act supersedes Sec. 1st, Rule III, of our Rules of Court in all particulars where they are inconsistent.
3. The petition must be signed by "twenty freeholders resident in the township." It need not be averred that they are qualified voters of the district.
4. Twenty of the petitioners must be residents, and each of the twenty must be the owner of a freehold estate in possession in lands situated in the township to be divided.
5. A petition was presented signed by fifty-seven persons, only nineteen of whom were qualified as above required. After the commissioners had been appointed, but before they had reported, the petition was amended, by leave of court, by the addition of three other names.—*Held*, that the court had power, upon discovery of the mistake, to permit the amendment. *Williams v. Johnson*, 16 W. N. C. 223 distinguished.
6. Where the evidence for and against the new district was evenly balanced, but it appeared that a considerable number of the voters would be greatly inconvenienced thereby, and it would not be feasible to accomplish the same result by a change of the polling place, the report of the commissioners in favor of the district was confirmed.

Exceptions to report of commissioners.

The opinion of the court was delivered September 7, 1885, by

RICE, P. J.—On August 1, 1884, a petition purporting to be signed by at least twenty freeholders, resident in Huntington township, was presented to court, praying for the erection of an additional election district in said township, and on the same day commissioners were appointed. On September 15, 1884, an affidavit of one of the petitioners was presented to court, in which it was stated that, when the original petition was presented it was supposed and believed that it had been signed by at least twenty freeholders resident in the new district, but that, on in-

vestigation, it had been found that some of the signers who were believed to be freeholders were not freeholders resident in the proposed new district. The affidavit concluded with a prayer that the petition be amended by the addition of other signatures. The court thereupon made an order granting leave to amend, and pursuant to this order three more persons, who were undoubtedly qualified signed the original petition. On September 19, 1884, the report of the commissioners recommending the erection of a new district as prayed for was filed and confirmed *nisi*, and the case now comes before us for final disposition upon exceptions and depositions.

The first exception is, that "the petition is not signed by twenty freeholders of said township, nor does it appear that twenty qualified voters have prayed for the erection of said district."

The last half of this exception is evidently based on Sec. 1st, Rule III., of our Rules of Court. That rule is misleading. It was framed shortly after the adoption of the constitution of 1874, and was intended to prescribe the method of exercising the power conferred upon the courts by Sec. 2d, Art. IV., of that instrument. Subsequently to the adoption of the rule, the act of May 18, 1876, P. L. 178, entitled "An act to prescribe the manner by which the Courts of Quarter Sessions may change the boundaries of election districts and townships," was passed. The words in the 2d sec., "for the purpose of dividing any township into election districts," might, if a very narrow construction was sought for, give some grounds for the supposition that the act was only intended to apply to a general division of a township into districts, and not, as is the case here, to the creation of an additional district out of a part of one of the districts into which a township has already been divided. It is only by some such construction as this that the conclusion can be deduced, that the act does not apply to the present case, and that, therefore, if the court has any power in the premises, it is derived directly from the constitution, and its exercise is to be regulated by the rule of court referred to. The title of the act, the immediate context of the language quoted, and the evident purpose of the legislature to prescribe a method in which the power conferred by the constitution should be exercised, convinces us, however, that this

construction is too narrow. The commissers are required "to make a plot or draft of the proposed new election district or districts," (sec. 2), the court is to designate the place "for holding the elections in said new election district," and is to "appoint the election board for holding the elections in said new election district," etc. (sec. 4); all of which provisions tend to show that the power of the court is not exhausted by a single general division of a township, and that new districts may be created as occasion may require, without necessarily reorganizing all of the established districts thereof. This has been the construction uniformly given to the act in this court since its adoption, and in conformity thereto we conclude, that it supersedes the rule of court upon the subject in all particulars wherein they are inconsistent. Among these are the inconsistent provisions as to the qualifications of the petitioners. Under the rule they are required to be "qualified voters of the election district," while according to the act they are to be "freeholders resident in the township." The latter provision controls in the present case, and, therefore, the petition, on its face, avers all the facts required to confer jurisdiction, even though it does not aver that the petitioners are qualified voters of the election district. This is all that need be said upon this question, but it may be remarked, however, before passing to the next question, that, even assuming the fact to be essential, the depositions show that more than the required number of petitioners were qualified voters of the district.

Coming now to the first branch of the exception quoted, we find the facts to be as follows: The petition, as originally presented, contained the signatures of fifty-seven persons. Of these nineteen are shown by positive evidence to be residents of, and owners of freeholds in, the township; thirty-four are shown not to be owners of real estate; one, namely, J. I. Callendar, is entitled, as devisee under his father's will, to a farm located in the proposed district, after the termination of a life estate in his mother, who is still living; one, namely, A. D. Sutliff, is shown to have been a resident of the district and the owner of real estate in an adjoining township, but not in Huntington; and with regard to the remaining two, namely, Asa R. Allen and Boyd Truscott, there is no positive evidence either way. It is fair to

say, however, that the last two names are not included in the list of freeholders given by Mr. Harvey in his testimony, and it is very probable that both sides intended us to infer from this that they were not freeholders; we therefore leave their names out of question.

It is argued by the counsel for the petitioners that, if a petitioner is a resident of the township and the owner of a freehold, although the lands may be situated outside the township, he is qualified. Carrying this argument to its logical conclusion, the land may be situated in another county or even in another state. Possibly the language of the act might admit of this construction, but we do not think it imperatively requires it. It is to be observed, that citizens owning real estate in the township to be affected have a peculiar property interest in the matter, growing out of the liability of their land to taxation for the expenses of township elections, which would make it unlikely that they would petition for the erection of a new election district unless it was needed by the public. But the owner of a freehold situated outside the township has no such interest to give his judgment superiority over that of other citizens. The purpose of the legislature in annexing this qualification was undoubtedly to interpose reasonable safeguards against the creation of unnecessary districts, but, unless we hold that the freehold estates of the petitioners must be in lands situated in the township to be divided, the check naturally growing out of the pecuniary interest of the petitioners in the matter will be lost. In view of the evident purpose of the qualification, and the construction given by the courts in analogous cases, we are of opinion that the true construction of the act requires the petitioner, first, to be a resident, and, second, to be the owner of a freehold estate in possession in lands located in the township to be divided. For example, it was held in construing the act of March 21, 1806, (4 Sm. L. 329,) which entitles a defendant to stay of execution, if, in the opinion of the court, he is "possessed of a freehold worth the amount of such judgment clear of all incumbrances;" that the defendant must be the owner of a freehold in the county where the judgment is obtained. *Com. v. Meredith*, 5 Binn. 431. Where an act required appraisers to be "freeholders and residents in the county," it was held that the words "in the county"

referred both to the word "residents" and to the word "freeholders," "in which sense," says the court, "the necessary qualifications will be that he be resident and have a freehold in the county," *Simpson v. Cox*, 3 N. H. 85. Where the power to lay out a highway could only be exercised "upon petition of not less than thirty resident freeholders," etc., the court, in construing the statute, said: "Obviously a resident freeholder of a town must be, first, a resident of that town, and, second, he must own a freehold interest in lands situated therein." *Damp v. Dane*, 29 Wisc. 419. In our own court, the words "seven disinterested freeholders of the borough," in the act of April 22, 1856, sec. 1, P. L. 525, relating to laying out borough streets, have been held to require the viewers to be owners of freehold estates in lands situated in the borough. (See *Street in Nanticoke*, No. 309 September session, 1877, MSS. opinion.) In all of these cases the language construed differs slightly from that used in the act of 1876 *supra*, but in none of the cases does it more clearly require the construction given.

It follows that, leaving out the two names with regard to which there is no express evidence, the petition as originally presented lacked one signer of the number of qualified freeholders required by the act. Could this defect be cured, and was it cured by the amendment?

That it is within the discretionary power of the court to permit amendments in proceedings of this nature, we do not think can be seriously questioned. This power has been exercised by the courts in contested election proceedings, before it was expressly recognized by the act of 1874, *Election Cases*, 15 Sm. 20, in proceedings under the lateral railroad law, *Boyd v. Negley*, 4 Wr. 377; *Same v. Same*, 3 Sm. 387; in proceedings under the general railroad law, *Penn'a R. R. Co. v. Lutheran Congregation*, 3 Sm. 445; in proceedings in the Orphans' Court for the sale of land, *Kennedy v. Wachsmuth*, 12 S. & R. 171, and in other analogous cases, for which it is not necessary to cite authorities. These are enough to show that the power exists. But, it is argued, conceding that the court has the power in certain cases, the amendment allowed in the present case was not merely formal, and therefore, upon the principle of the recent decision in *Williams v. Johnson*, 16 W. N. C. 223, it was unauthorized. The

principle upon which that case was ruled would be applicable here, if at the time the amendment was made the allotted period within which a petition must be presented in order to give the court jurisdiction, had expired. But such was not the case. There was nothing to prevent the institution of proceedings *de novo*, or to prevent the court from making a new order upon the amended petition, reappointing the commissioners. Had that been done, it is not likely that objection would now be made. Practically, what the court did was the same in effect as if the amendment had been accompanied by such a formal order. The appointment was allowed to stand, and as the commissioners did not file their report until subsequently, it may be regarded as made in pursuance of the perfected petition. The courts are very careful not to allow amendments which will deprive the opposite party of any valuable right; in other cases the tendency is to great liberality. In the present case no one was deprived of or prejudiced in any right, the failure to obtain the number of qualified signers required by the act was purely the result of a mistake, and the fact that the petition was not so signed is only established by the most rigid construction of the statute. While the question is not entirely free from difficulty, we are not satisfied that the allowance of the amendment, at the time it was made, was unauthorized.

On the merits of the case the evidence for and against the new district is very evenly balanced. It is certain that it is not required on account of the number of voters in the district as now constituted, but it does appear that a considerable number of the voters are now obliged to travel a long distance to the present polling place and would be greatly inconvenienced by the erection of the new district. It does not appear that it would be feasible to change the polling place so as to accomplish the same result, as it did in the Hunlock's case, where we set the report aside. It is to be observed that the report of the commissioners is entitled to very great weight, and ought not to be overruled unless the court is clearly satisfied that it is erroneous. On the whole, we conclude that giving the report its proper weight, the exceptions should be overruled. (See *In re Nescopec*, 1 Kulp, 130).

The exceptions are overruled and the report of the commissioners is confirmed absolutely.

THE LUZERNE LEGAL REGISTER.

VOL. XIV. FRIDAY, SEPTEMBER 25, 1885.

No. 39

Court of Common Pleas of Luzerne County.

O'MALLEY v. THE LUZERNE BUILDING AND SAVINGS ASSOCIATION, OF PITTSBURGH.

1. O. assigned a lien to L.; at the time of the assignment S., who acted as the agent of L. in the transaction, said that he would pay O. the consideration as soon as he got the money from his principal—*Held*, that the liability of L. to pay immediately was not thereby affected, and that the statute of limitations began to run on the date of the assignment, although the agent did not receive the money until some time afterwards.
2. A subsequent acknowledgment and promise to pay a debt made by the agent who contracted it, will not prevent it from being barred by the statute, the promise not being made in pursuance of special authority, nor forming a part of the agent's proper business, nor founded on a new consideration.
3. But a debt may be taken out of the statute by the act of an agent done in the regular course of his business, if he has special authority for that purpose, or if such authority be necessarily implied from the nature of his duties.

Exceptions to report of referee.

The opinion of the court was delivered December 17, 1883, by

RICE, P. J.—If this were an action against Mr. Stark, or his estate, there might possibly be some room for argument that, as Mr. Stark's promise was to pay as soon as he got the money from the defendant association, and as the referee has found that there is no specific evidence of his having received any funds of the association for this purpose until the sheriff's sale of the Lyons property, the plaintiff's right of action did not accrue before that time. But this is not an action against the estate of Mr. Stark, nor is it based on any contract made by him in his individual capacity. He was the agent of the association in the transaction, undertook to act only as such, and was so understood to be by the plaintiff. The referee has found that the assignment of the lien to the association was in pursuance

of a contract for the out and out purchase of the same by the latter, in which Mr. Stark acted as its authorized agent. This being the case, it would seem to be clear that, if nothing had been said as to the time of payment, the liability of the association would have been to pay immediately, and the statute would have begun to run at once. This liability to pay immediately was not changed into an undertaking to pay at some future time, or upon the happening of some future event, by the statement of Mr. Stark that *he* would pay as soon as he got the money from the association, his principal; for this was a contingency entirely within the control of the association. In legal effect, there was, arising from the purchase of the plaintiff's lien, an immediate liability to pay at the time of the assignment, then the right of action accrued, and from that time the statute began to run. The question then arises whether the referee erred in holding that there were sufficient acknowledgements and recognitions by Mr. Stark of the existing indebtedness as well as promises to pay the same to take the case out of the statute. The reason urged in support of this exception is, that the evidence does not show that Mr. Stark had any authority from the association to continue the liability of the defendant beyond the statutory period. Resulting from the general rule upon the power of an agent to bind his principal by his declarations and admissions, it has been held that, on a debt contracted by an agent, the statute of limitations begins to run in favor of the principal, from the time when it is payable by the terms of the contract, and that a subsequent acknowledgment and promise to pay it, made by the same agent or any other, cannot be received in evidence to prevent it from being barred, the promise not being made in pursuance of special authority, nor forming a necessary part of the agent's proper business, nor founded on any new consideration. *Watts et al. v. Devor*, 1 Grant, 267. What an agent says, does, or writes at the time of making a contract, or when engaged in the discharge of his duty as agent, is admissible against the principal, but his declarations made after the expiration of such agency, or after the business in which he has been engaged has been fully settled, cannot be so used. Hence the mere facts that Mr. Stark acted as the agent of the association in making

the contract for the purchase of the plaintiff's lien, that he was a director and general attorney of the association, and continued so to be down to the time of the sheriff's sale and after, would not, in themselves, be sufficient to show authority in him to continue the defendant's liability beyond the statutory limitation, by acknowledgments or new promises not based on any new consideration. But, at least so far as the plaintiff knew, the authority delegated to Mr. Stark in carrying out the resolution of the board of directors, was general and unrestricted. Therefore whatever was said by him at the time of the purchase of the plaintiff's lien, and which entered into the contract, bound the association. While the plaintiff parted with his lien upon the credit and undertaking of the defendant, the agreement and understanding of all parties was that the consideration was to be paid through Mr. Stark. Indeed, it is claimed by the defendant that the money was placed in his hands to enable him to carry out the resolution, although this was not known to the plaintiff. This fact, instead of operating against the plaintiff, seems rather to give strength to the conclusion that Mr. Stark's authority was general, that he had authority not only to make the contract, but to execute it; not only to create the liability, but to discharge it. In addition he was held out and designated to the plaintiff as the person who would carry it out to completion for the association, and continued to act for the latter in the management of the whole business until the association had acquired the full benefit of the plaintiff's lien. Upon this state of facts, does it not appear that he was the proper person upon whom to make demand? Was not the plaintiff proceeding according to the original understanding in doing so? As to the plaintiff and so far as this transaction was concerned, did not Mr. Stark stand in the same relation to the association as if the authority exercised by him in speaking for it had been incident to the duties of some executive office held by him therein? Says Mr. Justice Gibson, in *Watts et al. v. Devor, supra*, "Certainly a debt may be taken out of the statute by the act of an agent done in the regular course of his business, if he has specific authority for that purpose, or if such authority be necessarily implied from the nature of his duties. But this results, not

as the court below seems to have thought, from the power to create new debts, but from the distinct and independent power to settle and adjust old ones." Here Mr. Stark was authorized, not only to create the liability, but also was the authorized and designated agent for its discharge. Being the person who, from all the evidence and by the terms of the original contract, was to carry out the defendant's engagement, upon whom the plaintiff was to make demand for, and from whom he was to expect, payment—not as the mere clerk or servant of the association, but as the fully accredited agent with apparently unrestricted authority to act in the matter—it seems to us that his authority did not terminate upon the assignment of the judgment, and hence that his acknowledgements made to the plaintiff in response to the latter's demands, were within the apparent scope of his duties and authority, and were admissible in evidence against the defendant. The case is not free from difficulty, but we are not satisfied that the referee erred.

The exceptions are overruled, the report of the referee is confirmed, and judgment is entered thereon in favor of the plaintiff for the sum of one hundred and forty-seven dollars and six cents.

G. Mortimer Lewis, for plaintiff.

L. H. Bennett and F. M. Nichols, *contra*.

The old reporters often note the manner of the judges. Godbolt tells us that the "Lord Chancellor, smiling, said" that a case might be doubted. Rolle questions the correctness of an opinion uttered by Coke, since "Haught semble a disallower ceo car il shake son capit at ceo." And Saunders reports a case where a majority of the court gave judgment for the plaintiff, but "Twisden Justice contratotis viribus, and that the action did not lie." In recording the judgments of this somewhat passionate judge, the reporters begin, "Twisden, in furore, observed," etc.

E. B. Yordy has a few more Court Rules left. They contain the rules of the Common Pleas, Orphans' Court, Quarter Sessions, Supreme Court, and Equity.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, OCTOBER 2, 1885.

No. 40

Court of Quarter Sessions of Luzerne County.

IN RE ROAD IN HUNTINGTON

Roads, vacation of

Where a road has simply been cut through, but has not, either wholly or in part, been opened and made passable for public travel, it cannot be vacated, except upon the petition of a majority of the original petitioners for the road.

Exceptions to report of viewers and reviewers.

The opinion of the court was delivered September 7, 1885, by

RICE, P. J.—On February 4, 1882, a report of viewers was filed laying out the road in question for public use. No exceptions were filed, nor was a review asked, and the report was duly confirmed absolutely, and the damages were paid. On September 17, 1883, a petition numerously signed, but not by a majority of the original petitioners, was presented to court setting forth that the road had been opened in part, that it was not needed, that it was useless, inconvenient, and burdensome, and praying for its vacation. At the next term the viewers appointed upon this petition reported in favor of vacating the greater portion of the road. Exceptions were filed and a review applied for. The reviewers have reported adversely to the vacation of any part of the road, and exceptions have been filed to their report.

The first question of importance in the case is, whether, when the petition to vacate was presented, the road had been "opened in part" within the meaning of the act of May 3, 1855, P. L. 422; for if it had not, then the court had no authority to order its vacation except upon the petition of a majority of the origi-

nal petitioners, and the present proceeding must be dismissed. Madison and Harmony, etc., Road, 1 Wr. 417; Road in Carbondale Township, 3 Luz. Leg. Reg. 17. Upon this question there is no serious conflict of testimony, and in order to fairly present the question we will quote such portions thereof as are pertinent. But before doing so we deem it proper to refer to one fact, which, although by no means conclusive, throws some light on the subject. Some of the witnesses estimate the cost of opening the road as low as six hundred dollars, while others put it as high as twelve or fifteen hundred dollars. It is probable that it would be somewhere between those extremes, and, therefore, in any view of the matter the work which has been done upon the road must have been comparatively insignificant in amount, inasmuch as only about fifty dollars have been expended therefor. We come now to the testimony of the witnesses as to the actual condition of the road. William H. Sturdevant, one of the reviewers, says: "The road was cut out but not graded. * * * From our beginning point for some considerable distance, possibly a quarter of the length of the road, the road was along a side hill—not so very steep—such as by cutting down one half of the road and throwing it out to form the outer half would form a very good road bed. After passing that the ground lay comparatively level. There was one place, for a short distance, as I recollect, that was quite wet, and at another point it was quite stony, both of which places it would require some filling to form a road bed other than by ploughing—material would have to be borrowed. The material to be borrowed was in the neighborhood. * * * The road ran through the woods part of the way, and where it ran through the woods the woods were cut, cleared out." S. F. Monroe says: "I have been on the road; cannot drive it. It is a side hill road." D. G. Larned says: "In my judgment the road proposed to be vacated has not become useless, inconvenient, or burdensome, for the reason that it has never been so completed that the traveling public could use it." H. Larned expresses the same opinion, "for the reason that it has not been put through so as to be traveled and we could know." F. A. B. Koons says: "I think the proposed road is not burdensome and useless because it has not been traveled." J. B.

Sutliff says: "In my judgment the road has not become useless, etc., for the reason that the same has not been opened and worked so as to ascertain whether or not it would be." H. F. Harrison says: "This road has not been opened from one end to the other so that it could be traveled. * * * There has been some work done on this road. You cannot get through with a rig unless you carry it part way." On behalf of the opponents of the road Charles Good testifies: "The road has been cut out. I think fifty dollars have been expended on this road. I think to build a good fair road it would cost one thousand dollars." H. D. Watson says: "This disputed road has been cut through." Alexander McDaniels says: "I was supervisor in 1883. The road was partly cut out when I was supervisor—the rest has been cut out since. * * * The supervisors at the time the road was cut through were Mr. Hess and Mr. Gearhart. This was in 1882."

This comprises all of the testimony upon the subject, and, taking it all together, the fair conclusion is that, while the road had been cut through it had not, either in whole or in part, been opened and made passable for public travel. "The act of June 16, 1836, provides for the vacation or annulment of highways in two distinct cases. One of these is where the road has been opened and used and found from experience to be useless or burdensome. * * * The other case occurs where a reported road has not been actually opened for public use, and a majority of those who originally applied for it change their minds in respect to its propriety or necessity." Road in Augusta, 5 H. 73. It was held under this act and similar legislation which preceded it, that where part of a road had been fully opened there was no authority to vacate the unopened part, even upon the application of a majority of the original petitioners. Road in Greenwich, 1 J. 186. Judge Burnside said: "This petition and view under it was not authorized by either of the sections of the act. The 18th section relates to and contemplates roads that have been opened and used, and have become useless, inconvenient, and burdensome. The 19th section, under which the parties would seem to have proceeded, and which is copied substantially from the act of 1815, only authorized such a proceeding when the

road is *not opened*. Here the road was one-half opened" [part of the road was fully opened], "and there is nothing in the act of 1836, or any other act, which would authorize such a proceeding where the road is *in part opened*." Under this decision the defect in the act of 1836 was that it provided no method by which a road, which had been opened throughout part of its length, could be vacated. There was no omission of remedy where the road had not been fully opened in any part. Such a road is not opened, and it might be vacated under section 19. This defect in the law, which the above decision made apparent, was remedied by the act of 1855, which puts roads opened in part on the same footing with roads opened throughout their entire length. To remedy this defect, we think, was the entire purpose of the law, and to construe it so as to include a laid out road upon which some work has been done, however slight, but of which no part has been actually opened to public travel, would carry it far beyond what the legislature intended. Opening a road implies something more than throwing it open for the public to travel if they can. It need not be a first-class road; we do not say it need be finished, but, at least, it must be made passable as a public highway before it can be said to be opened. A fair construction of the act of 1855, whether we have regard to the plain meaning of the terms used, or the mischief the act was intended to remedy, would seem to require that the same must be said of some part of the laid out road in order to constitute it a road "opened in part." It follows that, inasmuch as the petition to vacate was not signed by a majority of the original petitioners, the present proceedings must be set aside. This conclusion renders it unnecessary, and, indeed improper, to express an opinion upon the merits of, or objections to, the road in question.

The fourth exception to the report of viewers is sustained, and the report and all proceedings connected therewith are set aside.

E. B. Yordy has a few more Court Rules left. They contain the rules of the Common Pleas, Orphans' Court, Quarter Sessions, Supreme Court, and Equity.

THE LUZERNE LEGAL REGISTER.

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FRIDAY, OCTOBER 9, 1885.

No. 41

Court of Common Pleas of Luzerne County.

BROWN v. CORAY.

The rule of the common law in regard to the application of payments, is to allow the creditor to make such application as he pleases, provided there is no direction by the debtor, and no definite contract on the subject.

Rule to stay Levari Facias.

The opinion of the court was delivered September 17, 1883, by

WOODWARD, J.—This case presents a question which may be thus stated: The plaintiff being a mortgage creditor of the defendant receives from him a payment of five hundred dollars. This he applies by giving the defendant credit for about three hundred dollars, being the amount of interest due and in arrear, and the balance he appropriates to the principal debt. The terms of the judgment confessed by the defendant were, that the interest was to be paid semi-annually, and in case of default for thirty days, the whole debt was to become due and payable. Assuming, for the sake of the argument, that if the whole payment of five hundred dollars had been applied to interest to accrue, there would have been no default, and, therefore, no right on the part of the plaintiff to issue his *levari facias*, it remains to inquire whose option, as to the application of the payment, is to have controlling force. Is it the debtor who pays, or the creditor who receives the payment, who may place and appropriate it? The civil or Roman law and the common law are not in entire accord on this question of the application of payments. Both recognize the right of the debtor to determine, in the first instance, how and where his payment shall be applied. But the

Roman law qualifies the rule, that where there is no specific application of the payment by the debtor, the creditor may place it as he pleases, with the proviso that the creditor must make the application as he would make it if he were the debtor. The ground of this proviso is the presumption that the payment is to be so applied as to be most beneficial to the debtor. The rule of the common law is, to allow the creditor to make such application of the payment as he pleases, provided there is no direction by the debtor, and no definite contract in the premises. In *Logan v. Mason*, 6 W. & S. 12, Gibson, C. J., says: "A right of choice is essentially exclusive; and if the creditor's right of application is to be controlled by the interest of the debtor, it is no right at all. The exercise of the power devolves on the creditor, either as a right or as a duty. If as a right, it is absurd to say he may exercise it, but only in subordination to the right of another." And again: "If anything has been settled by decision, it is that the right to apply a payment without restriction as to anything but the time, devolves on the creditor in default of application by the debtor." In the present case it seems, from the testimony, that at the time of the payment, to-wit, on April 25, 1882, the plaintiff gave to the defendant a written receipt in which the application of the money partly to interest and partly to the principal debt, was set forth. No objection was made to this by the defendant at the time, and the inference that the position now taken by him was an after-thought, seems to us a necessary and irresistible one. The only other question to which our attention has been directed in this case, arises out of the fact that the plaintiff made certain collections on contracts assigned to him by the defendant, after default made. It is argued that this amounts to a waiver of the default. Such is not the law. In cases between landlord and tenant, the receipt by the landlord of rent, as such, is held to be an admission that the relation of landlord and tenant is still in existence, and a waiver of any forfeiture of the lease which had previously accrued. But in cases like the present, where the relation is simply that of debtor and creditor, and where interest continues to accrue, whether default be declared and taken advantage of or not, the receipt of the whole or any part of the interest is entirely consistent with the

whole debt being immediately due and payable. (See opinion of Sharswood, P. J., in *Elliott v. Curry*, 1 Phila. 281).

The rule is discharged.

Allan H. Dickson and Thomas H. Atherton, for plaintiff.

E. S. Osborne, for defendants.

Court of Common Pleas of Luzerne County.

FRAUENTHAL v. DERR *et al.*

After the statute of limitations has run the plaintiff will not be permitted "to shift his ground" or enlarge its surface by amendment.

Motion for leave to file amended declaration.

The opinion of the court was delivered July 27, 1885, by

RICE, P. J.—As we remarked in our former opinion, there is considerable force in the defendants' contention that, judged by the first declaration, this suit was originally brought, only, to recover back the premiums paid by the plaintiff without consideration on certain invalid insurance contracts, the defendants having induced the plaintiff to pay said premiums by their false representations that they had authority to give time for the payment of the same, and that the said contracts were binding upon the companies from the time they were executed, notwithstanding the premiums were not paid until some time afterwards. In this view of the case the wrong complained of was simply that the plaintiff was induced to pay the premiums as aforesaid; the false representations constituting the deceit were as to their authority to give time for the payment of the premiums; and the measure of damages would be the premiums thus paid with interest. And if this view is correct, then it would seem to us to be beyond all question, that the declaration now proposed to be filed would introduce a cause of action totally different in every essential particular, except that it would be based on deceit. Notwithstanding the plausibility of the defendants' argument, we

are of opinion that the view taken by the counsel is too narrow, and conclude, after a most patient examination of the original declaration, that its averments are broad enough, at least with proper amendments as to the damages, to entitle the plaintiff to recover, not only the premiums paid but also all loss and injury which he may have suffered from being induced by the defendants' alleged deceit to enter into the contracts referred to. In this view of the case the wrong consists, not only in the plaintiff's having been induced to pay the premiums without consideration, but also in his having been induced to enter into, and rely confidently upon, the contracts, notwithstanding the premiums were not paid in advance, and the measure of damages would not be confined to the amount of premiums paid without consideration, but would also include the loss suffered by the destruction of the plaintiff's property by fire within the time covered by the invalid insurance contracts or policies, and within the time given by the defendants (without authority) to pay the premiums. *Krueger v. Pitcairn*, 5 Out. 311. But even taking this liberal view of the cause of action originally declared on, we cannot bring our mind to the conclusion that the proposed amendment confines the plaintiff's case to the original cause of complaint. Under the original declaration the cause of action is, that the plaintiff was induced by the defendants' deceit to enter into divers contracts of insurance which were invalid until the premiums were paid, and to refrain from the payment of the premiums for the space of six months after they were executed. The sole misrepresentation alleged is as to the effect of the non-payment of the premiums at the time of the execution of the contracts. Under the amended declaration an additional cause of action is alleged, namely, that the plaintiff was induced to enter into divers *parol* contracts of insurance which were invalid because the defendants had no authority to make such contracts on behalf of their principals, the insurance companies, and the additional deceit alleged is as to the defendants' authority in this particular, and the validity of such *parol* contracts. Thus, while both declarations allege that the plaintiff was induced by deceit to enter into contracts of insurance which the defendants had no authority to make, still it seems clear to us that, not only the deceit which was the induce-

ment to the contracts, but the contracts themselves are different, and constitute different causes of action. If this conclusion be correct, then it follows that an amendment which will thus permit the plaintiff "to shift his ground or enlarge its surface," cannot be allowed, especially after the statute of limitations has apparently run on every conceivable cause of complaint not originally declared on.

The motion is denied.

Harry Hakes and Agib Ricketts, for plaintiff.

Garrick M. Harding, H. W. Palmer, and A. F. Derr, *contra*.

Henry Coffin Magee, of Plymouth, was born in Carroll township (near New Bloomfield), Perry county, Pa., February 6, 1848. His father, Richard Lowrie Magee, was born at York Springs, York county, Pa., which his father had purchased while he was a resident of Philadelphia. Subsequently the family removed to Perry county. The mother of the subject of our sketch was Margaret Black, who was born near Carlisle, Pa., and was the daughter of William Black. H. C. Magee was educated in the common schools and afterwards attended the State Normal School, at Bloomsburg, Pa., from which he graduated in the class of 1871. He taught school from 1870 to 1876, and from 1871 to 1875 was principal of the graded public schools of Plymouth. He read law with B. McIntire, of New Bloomfield, and was admitted to the Perry county bar August 7, 1875, and to the Luzerne county bar October 21, 1875. Mr. Magee, is of Scotch-Irish extraction, has always been a republican in politics, and active in his party's behalf. He has interested himself in the preliminary and primary work at Plymouth, and in reward of that adhesion and activity has been burgess of the borough named, and was a member of the lower house of the state legislature, session of 1885 and 1886. In the last named body he has served upon several important committees, besides identifying himself conspicuously with numerous measures of a local and semi-local application, chief of which was the bill making an appropriation for the relief of the sufferers by the Plymouth

typhoid epidemic, and taking an active interest in most general legislative measures pending. Mr. Magee is a good lawyer, industrious, and of good standing as a citizen in the community with which he makes his home.

Charles Wesley McAlarney was born December 20, 1847, at Mifflinburg, Union county, Pa. He is the son of the late John McAlarney, who was born December 8, 1805, in the parish of Streat, in the county of Longford, Ireland, and who emigrated to this country in 1819, settling in Harrisburg, Pa., where he was educated. In his early manhood he was a school teacher, and subsequently he was a manufacturer and largely engaged in the lumber business. He resided for a while in the neighborhood of Milton, Pa., then at Selin's Grove, Pa., and, finally, removed to Mifflinburg, where he died May 17, 1876. The wife of John McAlarney, who is still living, is Catharine Wilson, the daughter of the late Thomas Wilson, who was a native of Hagerstown, Md., as was also Thomas Wilson, his father. Thomas Wilson the younger removed from Hagerstown to Middletown, Pa., then to Donegal township, Lancaster county, Pa., where Mrs. McAlarney was born. He subsequently removed to Elizabethtown, in the same county, where he died.

C. W. McAlarney was educated in the common schools and at the Mifflinburg Academy. At the age of eighteen years he commenced to teach school in his native county, and followed that profession for six years. He then removed to Harrisburg and commenced the reading of law in the office of his brother, Joseph Curtin McAlarney, and was admitted to the bar of Dauphin county, Pa., May 13, 1873. He practiced in the courts of that county until his removal to Luzerne county. He was admitted to the Luzerne bar February 7, 1876, and has been in continuous practice since. In addition to his brother above named, Mr. McAlarney has two other brothers, one of whom is Matthias Wilson McAlarney, also a lawyer. He has been the postmaster of Harrisburg for the last twelve years. He is also the manager and editor of the *Harrisburg Telegraph*. William Max-

well McAlarney, the other brother, is a practicing physician at Philadelphia.

The legal profession has recruited many of its brightest luminaries from among those whose earlier years were spent in teaching school. In this calling there is much to be acquired that in after life proves valuable to a lawyer. The stock of general intelligence necessarily receives material additions, and it never hurts a lawyer to know something outside of the law. A knowledge of child nature is obtained that cannot, for manifest reasons, be so well garnered elsewhere, and as men and women, the poet tells us, are but children of larger growth, the knowledge is certain to be of service to the lawyer, whose success not infrequently depends almost as much upon his understanding of human nature as of what is contained in the recorded decisions and the statutes. The somewhat rigid discipline to which the teacher must subject himself as well as those he teaches, will stand him in good stead when he comes to practice or to judgment, as it would, in fact, in any walk of life he might subsequently choose to follow. Whether, however, these particular speculations be strictly logical or not, or verified or antagonized in the facts, it certainly is true, as we have already said, that many of our best lawyers have graduated to the practice of the profession from the duties of the school-room. Mr. McAlarney is one of the number. He has been at this writing but twelve years in practice, but in that time has conveyed to a large circle of people the conviction that he is a safe counselor and zealous advocate, with the result of securing to himself, the advantage of a large and constantly increasing clientage. He is one of the comparatively few members of the fraternity who view its obligations and possibilities always from the serious side. His temperament is of the conservative order, modified by only so much of the sanguine as is necessary to the vigorous prosecution of all work deliberately undertaken. To the client who trusts him he is the soul of faithfulness, a fact which accounts in great part for the lucrative practice he has been enabled to build up in Plymouth and vicinity, and the gratifying success that attends his efforts in the courts. There are lawyers whose natural capacities are rendered less useful by indifference in their application, and

others who multiply their profitableness to those who employ their services by the telling and doing of all they know how to do or tell. To the latter category Mr. McAlarney belongs, and when we add that his knowledge of the law is the result of a similar devotion to the study of its intricacies, we have only said what is the just due of one of the most thorough and painstaking practitioners in Luzerne county. His politics are democratic, and he has frequently been talked of as a probable candidate some day for the position of district attorney, an office he would unquestionably grace and make serviceable to the cause of justice and the people. Mr. McAlarney is an unmarried man, resides in Plymouth, and has a very promising professional future before him.

John McGahren was born near Ellicottville, Cattaraugus county, N. Y., March 8, 1852. He is a son of Patrick McGahren, a native of Cavan, Ireland, who emigrated to this country in 1846, and is now a prosperous farmer in Wysox, Bradford county, Pa. His mother is Catherine Masterson, daughter of the late Cornelius Masterson, a native of Trim, county of Meath, Ireland, who resided in Newark, N. J., at the time of his death, at which place the elder Mr. McGahren was married. John McGahren was educated in the public schools of Wysox and at St. Bonaventures College, Alleghany, N. Y., graduating in the class of 1872. After Mr. McGahren left college he taught two terms in the public schools of Wilkes-Barre. He then entered the law office of Foster (C. D.) and Lewis (T. H. B.) as a student at law, and was admitted to the bar of Luzerne county February 14, 1876. He was associated with Mr. Foster until 1881, and with Garrick M. Harding until the early part of the present year. In 1882 he was the democratic candidate for district attorney, and was elected for a term of three years by a vote of 10,358, as against F. M. Nichols, republican, who had a vote of 9,394. Mr. McGahren is an unmarried man, and a typical self-made young man. His start in life was unaccompanied by any auspicious influences apart from the mother wit and disposition to industry with which nature had endowed him. His studies were prosecuted

without meretricious aids, and at times amid discouragements that would have overcome less ambitious and determined young men, and his admission to the bar and entry upon active practice had only the promise which good abilities and honest use of them will always fulfil. He became associated in business with Mr. Foster, and afterwards with Judge Harding, and thereby acquired advantages of which he plucked the most that they afforded. He is a democrat in politics and did good service on the stump and otherwise for his party whenever called upon. In due time friends proposed to repay him with a nomination for the district attorneyship. He consented, and after a sharp struggle secured a place upon the ticket and was elected. His services in the office have been profitable to the county and have brought him a reputation as a practitioner that is certain to stand him in good stead for so long as he shall need such assistance. He prosecutes the pleas of the commonwealth with all necessary vigor, and yet not vindictively towards those whose misfortune it is to fall into the clutches of the violated law. He has managed in the pursuit of these methods to secure conviction in almost every case in which justice required it, and yet avoid that persecution which so often follows the unfairly accused. Mr. McGahren's measure of success equals that of any other member of the bar of no greater age, and his prospects are full of the brightest possibilities.

Nathaniel Taylor was born in Danville, Montour county, Pa., January 28, 1848. He is the son of William Taylor, a farmer who resides near Mooresburg, Pa., and who is a native of Hereford, England. The mother of Nathaniel Taylor was Maria Michael, the daughter of John Michael, of London, England. Mr. Taylor, the subject of this sketch, was educated at La Fayette College, Easton, Pa., from which he graduated in 1873. During portions of the years 1875 and 1876 he attended the Law School connected with Columbia College, New York. He also read law with Isaac X. Grier, of Danville, and was admitted to the bar of Montour county in February, 1876. On April 5, 1876, he was admitted to the bar of Luzerne county, and has been in

continuous practice since. He married, February 21, 1878, Annie Vincent, of Danville, Pa. Mr. and Mrs. Taylor have no children living. Nathaniel Taylor is a man of quiet demeanor and kindred temperament, who owes all that he is or has attained to hard work and perseverance in study and practice. He takes but little interest in politics, or in anything outside of his profession, of which he is, as a consequence, one of the most useful of the junior members. In the writing of these biographies we have been many times impelled to what may seem to the reader to be dull homilies upon the superiority of even moderate talents when accompanied by industry, to greater natural qualities without that aid, as a means of evoking success in the legal or any other profession. It is as true, nevertheless, as anything can be in this world. When it can truthfully be said of a lawyer that he works, no stronger evidence can be given of the fact that he is worth employing. And when, on the other hand, necessity compels the admission that he makes his practice wait upon his personal convenience or pleasure, there is certain to be risk in calling his services into requisition, no matter how brilliant may be his endowments at Nature's hands. Mr. Taylor has improved his opportunities, and, with the aid of a fine education, has succeeded in securing a profitable clientage.

Sir Samuel Romilly designates the Act of Elizabeth concerning Egyptians as "the most barbarous statute that ever disgraced our Criminal Code." It was enacted that "all persons above the age of fourteen years, that shall be found in the company of vagabonds commonly called or calling themselves Egyptians, or counterfeiting or disguising themselves, by their apparel, speech, or behaviour, like them, although they are persons born within the king's dominions, if they continue one month, are felons and ousted of clergy." Sir Matthew Hale's only observation upon these statutes should be noticed: "I have not known these statutes *much* put in execution, *only* about twenty years since, at the Assizes at Bury, about thirteen were condemned and executed for this offense."

THE LUZERNE LEGAL REGISTER.

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No. 42

Court of Quarter Sessions of Luzerne County.

COMMONWEALTH OF PENNSYLVANIA v. COONRAD.

1. The new mine law approved June 30, 1885, is a penal statute, and, as such, is to be strictly construed, but its wise and benevolent purpose is not to be defeated by judicial refinements, and an over-sensitive regard for possible doubts.
2. Under Rule 8th of Article XII., if, by reason of noxious gases, *or of any cause whatever*, an anthracite coal mine has become dangerous, it is the duty of the mine foreman to compel every workman to retire from the mine, and to remain out until after a proper examination of its condition has been made. Failure to do this is negligence and a disobedience of the law.
3. The nature and character of the duty and authority vested by this act in the mine foreman, and the responsibility of that officer for disasters which occur because of non-compliance with the requirements thereof.

The opinion of the court was delivered October 7, 1885, by

WOODWARD, J.—On August 24, 1885, upon the presentation of an affidavit of G. M. Williams, the inspector of mines for the Third district of Pennsylvania, under the act entitled "An act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania, and for the protection and preservation of property connected therewith," approved June 30, 1885, we directed a warrant to issue for the arrest of the defendant, returnable on September 10, 1885. Upon that day the testimony of witnesses was taken, and subsequently we listened to the arguments of counsel for and against the defendant.

The facts of the case may be briefly stated. At Mocanaqua, in Luzerne county, there is a colliery operated by a corporation known as "The West End Coal Company." The mine is worked through a tunnel and slope, and Christian Coonrad, the defendant in the present proceeding, was and is the "mine foreman"

thereof. On August 11, 1885, owing to the disarrangement of the fan by the breaking of a strap on the eccentric, and the bending of the crank shaft, the air current in the mine became reversed, and the gas generated by the fire under the boilers was taken through the workings of the mine, instead of being conducted through the proper channel to the outside. At the time when this occurred a gang or shift of men were at work in the mine as usual. The machinery connected with the fan was taken apart by the mine engineer and sent to the proper shop for repairs, the fire under the boilers being kept up. The fan stopped about 11 o'clock on the night of August 10, and the workmen then in the mines came out between 1 and 2 o'clock on the morning of the 11th. The next gang went in at 7 o'clock on the morning of the 11th, at which time the repairs to the machinery had not been completed. No examination of the mine seems to have been made by the mine foreman before these men went in to their work. About 8 o'clock the alarm was given that the workmen were being overpowered by the poisonous gas in the mine, and, as rapidly as possible, efforts were made for their rescue. The result was, that out of fifty or sixty men who entered the mine at 7 o'clock, ten were brought out dead, and between twenty or thirty more or less disabled. The cause of death is thus stated by Dr. Hughes, who was examined as a witness: Question. State whether or not, on the 11th of last August, you were at the West End Coal Company's works. Answer. I was. Q. Whether or not you examined the bodies of a number of victims of that accident. A. I saw them all. Q. How many of them were dead? A. Ten dead ones. Q. How many others were affected and lived? A. I could not tell that—a great many, twenty or thirty I presume. Q. State what caused the death of these men. A. They died from asphyxiation, from poisonous gas—noxious gas produced the death. Q. How were these men affected? A. Those that I saw were unconscious, and I can only judge how they were affected by the way I was affected myself. Q. You went in the mine, did you? A. Yes, sir. Q. What were the symptoms? A. Bad feeling about the head, weakness about the lower extremities, and considerable headache—had a great headache for a considerable time after.

Q. It was owing to the breathing of noxious gases that prevailed in the mine? A. Yes, sir.

The cause of the disaster is further explained by the testimony of Mr. Williams, the mine inspector, to which we now call attention: Q. Will you state from your examination and your knowledge of mining and ventilating apparatus, what was the cause of this disaster? A. The cause arose from the fan breaking, and the air current reversing taking the gases from the boiler fires into the working. Q. What is the nature of those gases? A. Carbonic oxide and carbonic acid, perhaps, mixed. Q. They are the gases that are produced by the burning of the coal under the boilers? A. Yes, sir. The fan is located between the boilers and the outlet where the air is going out of the mine, and the heat from the boilers keeps that passage warm for a certain length of time. As long as the heat would be maintained at a higher temperature than the heat of the atmosphere outside, the air current would pass out in the right direction. But if that should become cooler than the outside air, then the air would reverse and take the other course, consequently it would take the gases from the boilers down through the workings. Q. Was the danger arising from this cause an obscure or latent danger, or was it a danger which is, or ought to be, known to all men having charge of mines? A. Well, that depends upon the experience and knowledge of the mine foreman. Q. If he is a man thoroughly qualified for his position? A. Every foreman ought to know that when the elevation of the two openings in a mine is different—if one opening is higher than the other—every foreman ought to know that when the air is warmer outside than it is inside—the air current will pass down through the higher opening.

The act of June 30, 1885, provides, in Article X, Section 1, that "the owner, operator, or superintendent of every mine shall provide and maintain an adequate supply of pure air for the same, as hereinafter provided." Section 4 of the same article provides, that "the ventilating currents shall be conducted and circulated to and along the face of each and every working place throughout the entire mine, in sufficient quantities to dilute, render harmless, and sweep away smoke and noxious or dangerous

gases, to such an extent that all working places and traveling roads shall be in a safe and fit state to work and travel therein." Rule 3 of the general rules in regard to mines contained in Article XII., is as follows: "The mine foreman shall have charge of all matters pertaining to ventilation, and the speed of the ventilators shall be particularly under his charge and direction." The office of mine foreman is created and the duties of the office further explained by Rule 1 of the same article, in these words: "The owner, operator, or superintendent of a mine or colliery shall place the underground workings thereof, and all that is related to the same, under the charge and *daily* supervision of a competent person, who shall be called 'mine foreman.'" Rule 8 is as follows: "If at any time it is found by the person for the time being in charge of the mine, or any part thereof, that by reason of noxious gases prevailing in such mine, or such part thereof, *or of any cause whatever*, the mine or the said part is dangerous, every workman except such persons as may be required to remove the danger, shall be withdrawn from the mine, or such part thereof as is so found dangerous, until the said mine or said part thereof is examined by a competent person and reported by him to be safe.

We have thus endeavored to state fairly, and as fully as necessary for the consideration of the case before us, the nature and cause of the terrible disaster at the West End colliery on August 11; and also to bring clearly into view those provisions of the act of June 30, 1885, which seem to be applicable to the question presented for our determination. That question is this, Was the defendant, Christian Coonrad, guilty of an offense against the act of assembly by his failure to comply with its requirements, and did his negligence and failure to comply with those requirements result in and cause the disaster? Without quoting the testimony of the witnesses at length, we have no doubt from the evidence before us, that the defendant had knowledge of the fact that the fan had stopped, and that he did not prevent the workmen from going into the mine on the morning of the accident, notwithstanding this knowledge. Now, a mine foreman ought to know that in a mine dependent for its ventilation upon such appliances as were in use at this colliery, the

breaking of the fan and the presence of fire under the boilers would tend to produce a poisonous gas and drive it through the mines. And that this defendant was aware of this is shown by the fact that he said to the driver boss, the men "have no business down there" until the fan shall be started, as well as by other declarations made by him, which, while failing to amount to peremptory orders to the men to leave the mine, still serve to show that he was not ignorant of the danger. A very large proportion of the accidents, so called, which from time to time occur at our collieries, is traceable to that species of negligence which comes of familiarity with danger and a habit of taking the chances. But experience has shown that the business of mining anthracite coal cannot be prosecuted at hap-hazard, but that success and safety are only to be secured by the most thorough organization of the forces employed, and by a rigid obedience to the rules and regulations adopted and prescribed. A coal mine at best is a dangerous place. The men who, day after day, go in the mines are exposed to more peril, and encounter hazards of a greater variety, than those engaged in almost any other occupation. And it is in view of such considerations that our legislation on the subject has been directed to framing a statute which has for its object, as its title indicates, "to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania, and for the protection and preservation of property connected therewith." And while it is true that this statute is a penal one, and as such, according to the maxim of the law, is to be strictly construed, it is also true that the wise and benevolent purpose of the act is not to be defeated by judicial refinements and an over-sensitive regard for possible doubts. We adopt the language of Mr. Justice Thompson, in *Bartolett v. Achey*, 38 Pa. St. R. 277: "I admit that the statute * * * being a penal statute, is to be strictly construed; but this means no more than that nothing is to be taken against the party charged, by intendment. The meaning of the statute, if plain, is to be followed, notwithstanding, as in any other case. * * * Strict construction is not the same thing as construing everything to defeat the action. This is not what is meant by the expression."

The act of June 30, 1885, imposes upon the mine foreman duties of the most important character. He is clothed with great power, and made responsible for the faithful exercise of his authority. He is to have the charge and "daily supervision" of all the underground workings, as well as to all matters pertaining to the ventilation of the mines. Under Rule 8, to which we have before referred, if, by reason of noxious gases, "or of any cause whatever," the mine or any part of it becomes dangerous, every workman is to be withdrawn from the mine, and not be allowed to re-enter it until after a proper examination of, and report upon, its condition. It would seem to have been the intention of the framers of this act to concentrate in the mine foreman the chief magistracy, so to speak, of the mine. If he is unable to give his personal attention to all the details of the mining operations, it is provided by Rule 2 that the owner, operator, or superintendant "shall authorize him to employ a sufficient number of competent persons to act as his assistants, who shall be subject to his orders." Our attention has been called to the fact that this act of assembly had been approved but little more than a month before the disaster at this colliery occurred, and had not been published. This, of course, would not relieve us of the obligation to enforce the law, but, at the same time, in the case of an entirely new system of legislation, it might incline us to a more tolerant and less exacting view of the circumstances than we should otherwise feel bound to adopt. But the truth is that, so far as regards the duties of the mine foreman or boss, there is no material difference as respects the question now presented, between the recent act of assembly and that of March 3, 1870. The 8th section of that act provides that every coal mine and colliery "shall employ a competent and practical inside overseer, to be called mining boss, who shall keep a careful watch over the ventilating apparatus," etc.

As we have before said, there can be no doubt that the defendant was fully informed of the accident which had interrupted the working of the fan before the workmen entered the mine on the morning of August 11. Nor can it be doubted that he was an officer of sufficient intelligence and familiarity with the business of mining, to know that the mine was liable to become danger-

ous by reason of this state of things. What, then, was his duty? Clearly to permit no one to enter the mine except such person or persons as would be prepared and competent to make a careful and skillful examination and report. There is some evidence in the case that the defendant did warn some of the workmen not to enter, and notified them that the fan had stopped. But notice and warnings were not what the occasion and the circumstances called for. A stern and peremptory command was the one thing needful, and that the mine foreman, as the commander, had the right to give. It is admitted that this mine did not generate what are known as "explosive gases." Those portions of the statute which prescribe the rules and precautions to be observed, in reference to mines generating such gases are, therefore, not those to which we must refer ourselves in the present case. We have considered it as a case arising under other sections of the act, and especially in its relations to Rule 8 of Article XII., and to Article X., which is devoted to the subject of ventilation. And it seems to us that under the evidence in the case, the defendant was guilty of neglect and of a failure to comply with the requirements of the statute. That the disaster which occurred was the result of this negligence on the part of the mine foreman, we can see no good reason to doubt. Dr. Hughes, who reached the scene of the disaster shortly after it happened, and whose testimony has already been noticed, describes his sensations as he entered the mine. Other witnesses bear testimony to the same effect. There is nothing in any of the evidence taken which tends to show that a careful and thorough examination of the mine on the morning of August 11, by a skillful and competent expert, such as a mine foreman is supposed and ought to be, would not have disclosed the presence of noxious and dangerous gas. The failure to make such an examination, and the death of the ten men who perished in the mine, stand, therefore, in this case, in the relation of cause and effect, for it is not to be presumed for a moment that if the true condition of the mine had been known, the workmen would have been permitted to incur a danger with which no courage, nor power of will, nor strength of body was competent to cope. It is made our duty by Article XVIII. of the statute to ascer-

tain, in a case like the one under consideration, whether or not the defendant is guilty "willfully or negligently" of any offense against the provisions of the act. After a careful consideration of the case as presented to us by the testimony of the witnesses and the arguments of the counsel, we are of the opinion that Christian Coonrad is guilty of negligence, and of an offense against the provisions of the act of assembly of June 30, 1885. It only remains for us to impose upon him the sentence of the law.

The sentence of the court is, that Christian Coonrad pay a fine of fifty dollars to the county and the costs of this proceeding, and stand committed until this sentence be complied with.

Court of Common Pleas of Luzerne County.

TULLY *et ux.* v. WILLIAMSON *et al.*

Where the justice has jurisdiction of the case a *certiorari* issued more than twenty days after judgment is too late. Depositions showing error in the method of exercising the jurisdiction, will not alter the application of the twenty day rule.

Certiorari.

The opinions of the court were delivered September 21, 1885, by

WOODWARD, J.—The *certiorari* in this case was not taken within the twenty days allowed by the law. The defendants were present at the trial before the justice, and had full notice of the proceedings. It is not accurate to say that the magistrate had no jurisdiction of the case because one of the defendants was a married woman. His method of exercising his jurisdiction may have been erroneous, and not such as will sustain an execution against the separate estate of the wife.

The proceedings must be affirmed.

WOODWARD, J.—Where the justice has jurisdiction of the case, a *certiorari* issued after the lapse of twenty days is too late. *Garrahan v. Norton*, 1 Luz. Leg. Reg. 513; *Lehigh Valley R. Co. v. Murphy*, 11 Luz. Leg. Reg. 72. And the question raised by the depositions is not one of jurisdiction, but rather as to the method of exercising it.

The *certiorari* was too late, and the proceedings are affirmed.

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FRIDAY, OCTOBER 23, 1885.

No. 43

Court of Common Pleas of Luzerne County.

THE WILKES-BARRE WATER COMPANY ??. THE LEHIGH COAL AND NAVIGATION COMPANY *et al.*

Waters—Rights of riparian owners.

1. The remedy by injunction is not granted, of course, in every case of an infringement of a riparian right, but only to prevent irreparable mischief, or an injury such as could not be compensated in a suit at law.
2. The plaintiff was not only a lower riparian owner, but, as an incorporated water company, had acquired the right to take the water which would naturally flow into its reservoir and conduct it away to supply the inhabitants of a neighboring city. The defendant was a railroad company and claimed the right by virtue of a certain written release and a parcel license from upper riparian owners to take a considerable portion of the water to supply their locomotive engines and a picnic ground—*Held*, (a) A material diminution of the volume of water by the defendant was an infringement of the plaintiff's right; (b) The diminution of the supply being of such magnitude as to create or materially contribute to the plaintiff's necessity to pump from other sources, it constituted a substantial injury, which might be prevented by injunction.
3. *It seems* that a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of a stream so as to sensibly affect the flow of the same by the lands of other riparian proprietors.
4. Every riparian proprietor has a right to all the enjoyment he can derive from his interest in the stream, provided he exercises that enjoyment in a reasonable manner.
5. An appropriation and conversion into steam of a portion of the water by a riparian owner to run locomotive or other engines may not be *per se* unreasonable; but such use of the water may become unreasonable because of the quantity taken.
6. The necessities of the business of the upper owner are not the test of the reasonableness of such user, but the question is, whether there is such diminution of the water as to sensibly and injuriously affect the lower owner's enjoyment of the stream.

Exceptions to master's report.

The opinion of the court was delivered October 5, 1885, by

RICE, P. J.—If this were a contest between an upper and a lower riparian owner standing on an equality of right, it might well be questioned whether the present bill could be maintained.

The remedy by injunction is extraordinary. It is not granted, of course, in every case of an infringement of a right, but only, speaking in general terms, to prevent irreparable mischief, or an injury such as could not be adequately compensated in a suit at law. If, therefore, the plaintiff, being a lower riparian owner, can show no greater right to divert the water for purposes of sale than can the defendants, as grantees of upper riparian owners, to divert it for the purpose of supplying their locomotive engines, and the only injury shown is loss of profits by the former, a court of equity might be constrained, in view of the long continued acquiescence of the plaintiff in the use of the water by the defendants, and also of the serious damage to the defendants which would result from summary interference, to remit the parties to a court of law. *Richards' Appeal*, 7 Sm. 105, *Gray v. Ohio & Penn'a R. R. Co.* 1 Gr. 412; *Harkinson's Appeal*, 28 Sm. 196; *Pusey v. Wright*, 7 C. 387; *Heilman v. Union Canal Co.* 1 Wr. 100; *Cameron Furnace Co. v. Penn'a Canal Co.* 2 Pears. 208. This conclusion is based, however, on the supposition that neither party could show a right to detain and conduct away the water for the purposes stated. But here the plaintiff is not merely a lower riparian owner, but is an incorporated company, created for the purpose, and authorized by its charter to supply the inhabitants of Wilkes-Barre and those who live contiguous thereto with pure water from its reservoir, and in the exercise of its corporate rights and privileges it has, been, since 1859 to the present time, taking the water in such quantities as were needed for this purpose. It may be said that the privileges conferred upon the plaintiff company by its charter to enter upon and take land for a reservoir and for the purpose of laying its pipes, do not authorize it to take the water to the injury of others, without compensation. This may be conceded. *Shenandoah Company's Appeal*, 2 W. N. C. 46; *Gardner v. Newburgh*, 2 Johns. Ch. 162. But, be this as it may, the question of compensation, as we conceive, is a matter between the plaintiff company and those riparian proprietors lower down the stream, and not between it and the defendants; and we are not to assume, after the exercise of the claimed right for a period longer than is required to give a prescriptive right, that this question is still an

open one. We think, therefore, it must be assumed, for the purposes of the present case, that the plaintiff company is not only a riparian owner, but has the right to take the water which would naturally flow into its reservoir, and conduct it away for the purpose of supplying the inhabitants of Wilkes-Barre and those living contiguous thereto. It follows that a material diminution of the supply by the defendants without authority of law is an infringement of that right, and if this is of such magnitude as to create, or materially contribute to, the necessity for pumping from other sources, it constitutes a substantial injury to the plaintiff company, which may be prevented by injunction. The master reports that the amount taken by the defendants for their locomotive engines is not less than fifteen thousand gallons per day, which amount, in seasons of low water, nearly, if not quite, equals all the water running into the stream above their dam. The amount taken for use at Mountain Park on picnic days is from six to seven thousand gallons in the twenty-four hours, and this also materially lessens the quantity that would otherwise flow into the plaintiff's reservoir, and that, too, in a season when the stream is likely to be low. He further reports that, owing to the insufficient supply from the stream in question, the plaintiff company has been compelled during the low water season of each year since 1875 (with one exception) to pump and supply water from the river at considerable expense, and that, but for the diversion and consumption of the water by the defendants, the necessity for pumping in dry seasons would be materially diminished, although not, by any means, altogether avoided. For example, the plaintiff company pumped in 1882 for one hundred and fifty days at an expense of some three thousand dollars, and in 1883 fifty-six days at an expense of one thousand one hundred dollars. After a careful examination of the evidence we discover no reason for questioning the correctness of these findings of fact, and, being accepted as the basis of our considerations, it becomes manifest that it is not a trifling appropriation of water which the plaintiff asks to have enjoined, and the pecuniary injury resulting therefrom is not inconsiderable. These preliminary questions affecting the remedy in equity being out of the way, we are brought to a consideration of the

grounds upon which the defendants' claim of right is defended. They commenced taking the water to supply their locomotive engines in 1866, and to supply the picnic grounds at Mountain Park in 1883. This bill was filed at January term, 1884. It follows that their claim has not, in either case, ripened into a right by prescription.

In the second place, they are not riparian owners, but it is claimed that they have the rights of upper riparian owners by virtue of a certain written release, and a parol license from them to take the water. We do not question the correctness of the master's conclusion, as against the persons under whom the defendants claim, but it may be questioned whether the release and parol license under which the defendants claim confer upon them all the rights of riparian proprietors as against the plaintiff and other lower riparian owners. Upon principle there seems to be a plain distinction between the rights of an owner and the rights of a person claiming under a grant or license from the owner. Ownership of the land does not include ownership of the water which flows over or past it. The right which the owner has is to the use of it in common with the other owners, as an incident to the land. For many purposes connected with the enjoyment of the land to which the right is incident, the riparian owner may divert, detain, and even consume the water without regard to the effect which such use may have, in case of deficiency, upon proprietors lower down the stream. But has he, in all respects, an equal right thus to divert, detain, or consume the water for purposes which, although the same in kind, are in no way connected with the enjoyment of the land? Or, still further, may he entirely separate this right from the land to which it is incident and grant or convey it in all its force to another? Without illustrating or pressing these inquiries further, it may be said that the distinctions thus suggested are not original or speculative, but have the sanction of decisions entitled to very respectful consideration. The former was recognized to some extent in the case of *Garwood v. N. Y. Central, etc.*, R. R. Co. 83 N. Y. 400; and the latter was fully considered and made the basis of the decision in the case of *Ormerod v. Todmorden, etc.*, L. R. 11 Q. B. Div. 155, from which, at the risk of being tedious, we

venture to quote at some length. Brett, M. R., said: "The grant of a right to flowing water by a riparian owner is valid only against himself and cannot confer rights as against others. The law as to flowing water is part of the common law of England, but it only exists as between riparian owners; it does not extend to those whose lands do not abut on streams and rivers." Lindley, L. J., said: "I think it cannot be said that the defendants have the same rights as riparian proprietors." Brown, L. J., said: "I decide this case on the ground that the plaintiffs are riparian owners, and that their right to the flow of water in the stream has been injuriously affected by the defendants, who are not riparian owners. As I have before said, I do not pronounce any opinion upon the question whether the user by the defendants" (for manufacturing purposes) "was reasonable or was for extraordinary purposes." The syllabus thus concisely and correctly states the principle decided: A riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of a stream, and any user by a non-riparian proprietor, even under a grant from a riparian owner, is wrongful if it sensibly affects the flow of the water by the lands of other riparian proprietors. (See also *Stockport Water Works Co. v. Potter*, 3 H. & C. 300). If the above stated rule be accepted as a correct statement of the law, the use of the water by the defendants to the extent claimed by them cannot be justified, as against the plaintiff, by the release and parol permission of the upper riparian owners, whatever might be the rights of the defendants if they were such owners. But passing this view of the case and treating the defendants as if they were riparian owners, what are their rights? It is conceded that the upper riparian owner may appropriate the water of a flowing stream for domestic purposes and for his stock without regard to the effect upon the lower owner. But it is contended by the plaintiff that if he diverts it for what are termed extraordinary purposes, he must return it to the stream without material diminution or alteration. We are not to be understood as questioning this rule. Nevertheless, in applying it to a particular case, it is to be remembered that the great general principle back of the rule is, that each riparian owner is bound to exercise his

right to enjoy the stream reasonably, and there may be, in the particular case, well founded objections against resting the unreasonableness of the user complained of solely upon the purpose for which the water is diverted. To say, without qualification, that the upper owner may not consume any appreciable part of the water for manufacturing purposes, or to make steam to supply the motive power of his manufactory, or other legitimate business, without thereby, irrespective of any actual damage, committing an infringement upon the rights of his neighbor, would seem to be carrying the old rule to a very great extreme in this era when so many industries are dependent on steam as a motive power. In protecting the lower owner in the enjoyment of his rights, care should be taken not to impair the equal right of the upper owner to a reasonable enjoyment of the stream. The doctrine held in a recent case, in some respects parallel to this, commends itself. A railway company whose line crossed a stream in the immediate neighborhood of one of their stations, took water for supplying their engines and for the general purposes of the station. On bill filed by a mill owner lower down the stream, it appeared that the abstraction of water did no damage in wet weather, and never shortened the working of the mill for more than a few minutes a day. It was held that the quantity taken was not unreasonable. The doctrine announced by the court was, that every riparian proprietor has a right to all the enjoyment he can derive from his interest in the stream, provided he exercises that enjoyment in a reasonable manner. He may take all that is required for the purposes of his business, provided only, that he does not take so much as injures the other persons whose rights are equal to his own, which injury he can prevent by returning the requisite quantity into the stream. *Sandwich v. Great North. Railway Co.* L. R. 10 Ch. Div. 711. In a leading Massachusetts case the gravamen of the complaint was, not for diverting the stream itself, but for abstracting a part of the water of the stream to supply locomotive engines. Chief Justice Shaw, in delivering the opinion of the court said: "There is a right which each proprietor has, if exercised within a reasonable limit. The proper question, therefore, was whether, in the mode of taking, in the quantity taken, and the purpose for

which it there was taken, there was a reasonable and justifiable use of the water by Clark. The use being lawful and beneficial it must be deemed reasonable and not an infringement of the right of the plaintiff if it did no actual and perceptible damage to the plaintiff." But again he says: "If the use which one makes of his right in a stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below by diminishing the value of his land, though at the time he has no mill or other work to sustain present damage, still if the party thus using it has not acquired a right * * * * it is an encroachment on the right of the lower proprietor for which an action will lie." *Elliott v. Fitchburg Railroad Co.* 10 Cush. 191. Admitting then, as contended by the defendants' counsel, and according to the doctrine of the cases cited, that an appropriation and conversion into steam of a portion of the water by a riparian owner to run locomotive or other engines may not be *per se* unreasonable, still, in that view of the law most favorable to the defendants, it must also be conceded that such use of the water may become unreasonable because of the quantity taken. In deciding whether it is so or not, the necessities of the business of the upper owner are not the test, as the authorities cited by the master abundantly show, but the question is, whether there is such diminution of the water as to sensibly and injuriously affect the lower owners' enjoyment of the stream. Where this occurs—as is found here to be the fact—there is not only an infringement of the latter's right and, therefore, a technical legal injury, but also actual and substantial damage which a court of equity may take cognizance of, and restrain the defendant from continuing. Upon this branch of the case we do not think it necessary to add anything further to what the master has said.

We have said nothing as to the questions raised by the fourth and seventh exceptions, not because we have not thought them worthy of consideration, but because the master has discussed them so fully and satisfactorily as not to require further elaboration. After a careful examination of the questions we feel compelled, notwithstanding the earnest and forcible arguments of the defendants' counsel, to concur with the master in his conclusions and reasoning upon these points.

This cause having come on to be heard on bill, answer, testimony, and report of the master, and having been argued by counsel and duly considered by the court, the exceptions to the master's report are overruled and the report is confirmed; and it is ordered, adjudged, and decreed that an injunction issue in this case perpetually enjoining and restraining the defendants, their agents, superintendents, foremen, workmen, and servants from taking, diverting, using, or carrying away either the waters of Laurel Run stream for the purpose of supplying their locomotive engines at Laurel Run station, or the waters of Wheelbarrow Run for the purpose of supplying Mountain Park, so as to sensibly diminish at any time the volume of water in said streams, or either of them; and it is further ordered, adjudged, and decreed that the defendants pay the costs.

Court of Quarter Sessions of Northampton County.

COMMONWEALTH v. GRIM *et al.*

An agent for the Society for the Prevention of Cruelty to Animals is a peace officer, and should not be mulcted in costs when prosecution is begun in good faith.

Rule to strike off the imposition of costs.

The opinion of the court was delivered April 6, 1885, by

SCHUYLER, P. J.—W. Ashley Jones, the prosecutor, is the agent of the S. P. C. A. at Bethlehem. Upon statement made to him of the alleged malicious beating of a mule by the defendant, he made complaint before T. O. Fradnack, J. P., and the defendant was bound over to appear at court. The grand jury ignored the bill and imposed the costs on the prosecutor. The agents of the S. P. C. A. are regarded as peace officers, and as such entitled to the protection of the court. Purdon's Dig. p. 328, pl. 66. This provision is mandatory. The agent *must* make the arrest when his attention is called to a violation of the act. *Com. v. Jackson*, 1 Del. Co. Rep. 81; *Com. v. Ream*, 13. Lan. Bar, 134.

Rule absolute.

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FRIDAY, OCTOBER 30, 1885.

NO. 44

Court of Common Pleas of Luzerne County.

FILLEY *et al.* v. THE ITHACA ORGAN AND PIANO COMPANY.

1. The jurisdiction of this court to exercise the powers of a court of chancery, depends upon statutory enactments.
2. Our courts do not possess equitable jurisdiction over a foreign corporation, which has failed to comply with our laws prohibiting such corporations from doing business in this state.
3. The appointment of a receiver in one state is recognized, as a matter of comity, in others, unless his claims are in conflict with those of citizens of the others.

In Equity. Motion to take off and vacate the decree *pro confesso*, and for appointment of receiver.

The opinion of the court was delivered September 28, 1885, by

WOODWARD, J.—It now appears that on September 10, 1885, when the bill was taken *pro confesso* and the decree entered, an appearance had been entered by counsel. Two motions were thereupon made, one for an order to take off and vacate the decree *pro confesso*, and the other to compel the counsel who had entered the appearance to file his warrant of attorney. Upon the argument of these motions it has been made to appear that the Ithaca Organ and Piano Company is a foreign corporation created under the laws of the state of New York, and that it has not complied with our statute of April 22, 1874, in reference to such corporations. That statute provides that "no foreign corporation shall do any business in this commonwealth until said corporation shall have established an office or offices, and appointed an agent or agents, for the transaction of its business therein." It also further provides that "it shall not be lawful for any such corporation to do any business in this commonwealth until it shall have filed in the office of the secretary of the commonwealth, a statement under the seal of said corporation,

and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein; and the certificate of the secretary of the commonwealth, under the seal of the commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents, in each and every of said offices." The act further provides that "any person or persons, agent, officer, or employé of any such foreign corporation who shall transact any business within this commonwealth for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same." (See Pamphlet Laws 1874, p. 108. Purdon 1851).

Has this court any equitable jurisdiction over a foreign corporation which has failed to comply with our laws prohibiting such corporations from doing business in Pennsylvania, except upon certain conditions? If we have not, then clearly we have no authority to appoint a receiver, as we are asked to do in this bill. The act of June 16, 1836, Pur. 689, provides that the several Courts of Common Pleas shall have the jurisdiction and powers of a court of chancery so far as relates to "the supervision and control of all corporations other than those of a municipal character, and unincorporated societies or associations, and partnerships." While the letter of this statute might justify our courts in the exercise of their equitable power in certain cases, over a corporation which, although organized in another state, had engaged in business here, it does not seem possible that it can apply where the foreign corporation has transacted its business in plain violation of a law prohibiting its existence in this state for any purpose whatever. In *Dohnert's Appeal*, 14 P. F. S. 313, our Supreme Court say, "the jurisdiction of this court to exercise the powers of a court of chancery depends upon statutory enactments." In that case the court dismissed the bill, which was in the nature of a bill of interpleader, for the reason that, strictly speaking, such a bill was not the one "contemplated or intended by the act of 1836." In *Augusta v. Earle*, 13 Peters,

588, it was said that "a corporation has no legal existence out of the boundaries of the sovereignty by which it was created." The court in this case recognize, however, and discuss, the force of inter-state comity, and point out its proper qualifications and limits, concluding as follows: "Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without their sanction, express or implied." In the case of the Bank of Virginia v. Adams, 1 Parsons, 534, Judge King held, that "against a foreign corporation a court of equity in Pennsylvania can exercise no jurisdiction to compel stockholders residing here to pay the stock subscribed to such corporation, on the application of a creditor of such company;" and also "that a court of equity has no jurisdiction because a foreign corporation is insolvent, or its officers neglect to perform their duty, to compel them to execute their functions. The remedy is in the sovereignty where the corporation was created," etc. (See, also, Morris v. Stevens *et al.* 6 Phila. R. 489, opinion by Sharswood, J.)

The bill states, that the business of the corporation defendant was the manufacture and sale of organs and pianos, and that a large amount of the assets is in this state. These are said to consist of notes, book accounts, leases, and other evidence of property and choses in action, amounting to \$40,000 or \$50,000. The conclusion from this statement must be, that the corporation has been doing business in this state. And this *doing of business* is exactly what is prohibited by our act of April 22, 1874, in reference to foreign corporations. In Holt v. Green, 23 P. F. S. 200, our Supreme Court say "the test whether a demand connected with an illegal transaction is capable of being enforced by law, is, whether the plaintiff requires the aid of the illegal transaction to establish his case. * * * The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation." (See, also, Burkholder v. Beetem's Admrs. 65 Pa. St. R. 496). In the case before us the bill sets forth the fact that the party defendant is a foreign corporation, that it has become insolvent, and that a receiver has been duly appointed by the Supreme Court of Temp-

kins county, in the state of New York. It then proceeds to aver that doubt exists as to the extent of the extra territorial powers of the receiver thus appointed, as well as the existence of property, assets, and rights of action in this state, and for these reasons asks "that a receiver of the property and effects of the said corporation being and remaining in the commonwealth of Pennsylvania, be appointed," etc. It is nowhere alleged in the bill that this corporation has complied with the requirements of the act of April 22, 1874, and thus brought itself within our jurisdiction. In this view of the case, it becomes unimportant for us to pass upon the question of the right of a stockholder or director to appear against the motion for the appointment of a receiver, on the ground of want of jurisdiction. The bill itself not only fails to allege the facts necessary to invest us with authority to act, but it also sets forth other facts which persuade us that such authority does not exist. In conclusion we may add that, even if our jurisdiction to appoint a receiver for this corporation were unquestionable, it does not seem clear to us that we should be called upon to exercise it. While it is true that the legal authority of a receiver is co-extensive only with the jurisdiction of the court appointing him, or the territorial operation of the law under which he is appointed, it is also and equally true that, upon principles of inter-state comity, our courts will recognize such appointment, and give effect to the virtual assignment of property which may be within their jurisdiction. In other words, the appointment of a receiver in one state is recognized as a matter of comity in others, unless his claims come in conflict with those of the citizens of the state in which the proceedings arise. *High on Receivers*, §47; *Runk v. St. John*, 29 Barb. 585; *Bank of Virginia v. Adams*, 1 Parsons, 550; *Bagby et al. v. R. R. Co.* 5 Norris, 291; *Hintermeister v. Ithaca Organ and Piano Co.* MS. opinion of Judge Rice, in this court, on a rule to dissolve foreign attachment.

For the reasons stated we are of the opinion that the motion to take off the decree *pro confesso* should be granted, and that the motion for the appointment of a receiver should be denied, and it is so ordered.

E. P. & J. V. Darling and G. Mortimer Lewis, for plaintiffs.

S. J. Strauss, for defendant.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

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No. 45

Court of Common Pleas of Luzerne County.

ATHERTON *et al.* v. THE CITY OF WILKES-BARRE *et al.*

1. A foreign corporation which has not complied with the act of April 22, 1874, is not competent to enter into a contract such as that involved in this case.
2. When an act or contract is prohibited under a penalty, such act or contract will be unlawful and void, although the statute imposing the penalty does not expressly so declare.
3. The doctrine of equitable estoppel is firmly fixed in our law, and where a contract prohibited by law has been executed, and both parties are in *pari delicto*, neither can maintain an action to rescind it. Where the contract is still executory, however, equity will interfere. The law will not lend its support to a claim founded on its own violation.

In Equity. Motion to continue injunction.

The opinion of the court was delivered July 18, 1885, by

WOODWARD, J.—The bill and affidavits in this case present for our consideration a single question, which may be thus stated: Was the agreement made on June 10, A. D. 1885, between the City of Wilkes-Barre of the first part, and the Barber Asphalt Paving Company, of Washington, D. C., a corporation of the state of West Virginia, of the second part, a valid and legal contract, and such an one as the parties had a right to make? If this question be answered in the affirmative, then the injunction already granted should be dissolved; otherwise it should be continued in force. It is claimed by the complainants that the contract in question is illegal and void for several reasons. Among these it is alleged, that on June 10, 1885, the Barber Asphalt Paving Company was not competent to enter into such a contract, for the reason that it is a foreign corporation and had not complied with our laws in reference to such corporations. The act of assembly of April 22, 1874, P. L. 108, Purdon 1851, is as follows: "No foreign corporation shall do any business in this commonwealth until said corporation shall have established an office or offices, and appointed an agent or agents, for the transaction of its business therein." "It shall not be lawful for any

such corporation to do any business in this commonwealth, until it shall have filed in the office of the secretary of the commonwealth, a statement under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein; and the certificate of the secretary of the commonwealth, under the seal of the commonwealth, of the filing of such statement shall be preserved for public inspection by each of said agents, in each and every of said offices." "Any person or persons, agent, officer, or employé of any such foreign corporation who shall transact any business within this commonwealth for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same." It is admitted that, at the date of the contract, this corporation had not complied with the terms of this act of assembly. It is claimed by the defendants, however, that "the complainants cannot set up the inability of the Barber Asphalt Paving Company to do business in this commonwealth if the company cannot set it up, and that while the company might not be able to recover anything from the city on her contract, this would be to the city's benefit and not to her prejudice; and that the company could not, in a suit on the bond conditioned for the faithful performance of the contract, set up her own disability." In the case of *Swan v. Watertown Fire Ins. Co.* 15 Norris, 37, it was held that foreign insurance companies doing business in Pennsylvania without having complied with the provisions of our statute, "cannot set up their turpitude to defeat actions on their contracts brought by innocent persons." (See also *Kerr on Frauds*, 296, referred to by judge Clark as counsel in the same case. See also *Holmes Co. v. Barnard et al.* 15 W. N. C. 110). In *Railroad Co. v. Tranp.* Co. 2 Norris, 160, it was said, that "one who has enjoyed the fruits of his contract with a corporation cannot set up the defense that it was *ultra vires*." When a contract prohibited by statute has been executed, both parties in *pari delicto*, neither can

maintain an action to rescind it. *Burkholder v. Beetem's Admrs.* 15 P. F. S. 496; *Thorne v. Travelers' Ins. Co.* 30 P. F. S. 28. It is not necessary to multiply quotations of authorities for the purpose of showing that, in a very large classification of cases, the doctrine of equitable estoppel is firmly fixed and grounded in our law. But it becomes our duty to inquire whether these authorities touch the question now presented.

The act of the pavement company in making the agreement now in question was an illegal act. It was in plain violation of the statute in regard to foreign corporations doing business in Pennsylvania. It is true that the act of April 21, 1874, does not in terms declare that contracts entered into under such circumstances shall be absolutely null and void. But the act, nevertheless, is a penal one. In its third section it provides, that any officer of a foreign corporation who shall *transact any business* within this commonwealth for any such foreign corporation without the provisions of this act being complied with, *shall be guilty of a misdemeanor*, etc. Now, the rule of the law in regard to all such cases is this: When an act or contract is prohibited under a penalty, such an act or contract will be unlawful and void, although the statute does not expressly so declare. In the present case, under the act of 1874, the president and secretary of the Barber Asphalt Pavement Company, by affixing their signatures, with the seal of their company, to this contract, committed an offense against our laws, rendering them liable to an imprisonment in the county jail, *and* to a fine not exceeding one thousand dollars. Will a court of equity compel the execution of such a contract? In *Holt v. Green*, 23 P. F. S. 200, Mercur, C. J., states the rule of law as follows: "The test whether a demand connected with an illegal transaction is capable of being enforced by law is, whether the plaintiff requires the aid of the illegal transaction to establish his case, * * *. It has been well said that the objection may often sound very ill in the mouth of a defendant, but it is not for his sake the objection is allowed. It is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is, that no court will lend its aid to a party who grounds his action upon an immoral

or an illegal act. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation." We refer also, in this connection, to *Mitchell v. Smith*, 1 Binn. 110; *Seidenbender v. Charles'* Admr. 4 S. & R. 151; *Columbia Bank and Bridge Co. v. Haldeman*, 7 W. & S. 233; *Burkholder v. Beetem's* Admr. 15 P. F. S. 496.

It is true that in certain cases of *executed* contracts, there may be found some decisions apparently not in accord with the view of the law now stated. But here, as in many other instances, a constant regard for clear distinctions, will enable us to reconcile many apparent inconsistencies. It may be admitted, that when a contract prohibited by statute *has been executed*, both parties being in *pari delicto*, neither can maintain an action to rescind it. And this is what was held in *Burkholder v. Beetem's* Admr. 15 P. F. S. 496, and in *Thorne v. Ins. Co.* 30 P. F. S. 28. And clearly, in the case now before us, the question is not the same question which would arise if this agreement had been partly or fully executed, and was not entirely executory as it is. If the injunction had been asked for after the pavement company had begun the work upon Franklin street, it is possible we might have been compelled to hold, that neither the company, the city, nor the tax payers could take advantage of the failure by the company to comply with the statute. But the work has not been commenced, and the case is not that of an executed contract. There are many things which equity will interfere to prevent being done, which it will not undertake to undo when once accomplished. (See *Shuman v. Shuman*, 3 Casey, 94). But even in the case of contracts fully executed, the question is not free from doubt. (See the case of *Welland Canal Co. v. Hathaway*, 8 Wend. 480). It is admitted that, since the filing of the bill in this case, the paving company have filed in the office of the secretary of the commonwealth the statement required by the act of April 22, 1874. We do not see, however, that this fact can, in any way, affect the question now before us.

The motion to continue the injunction is granted and the injunction is continued.

E. G. Butler and S. J. Strauss, for plaintiffs.

Allan H. Dickson and George R. Bedford, *contra*.

Court of Common Pleas of Tioga County.

JOHNSON v. THE A. & N. P. R. R. COMPANY.

The mileage to be allowed witnesses is according to the distance by the usual and ordinary route of traveling by the common modes of conveyance. Because a railroad has been built which is longer by several miles than the common road, that is no reason why mileage on the longer (the railroad) route, should be allowed.

Relaxation of costs.

[So much of the opinion as relates to the subject of mileage to be allowed witnesses only is given.]

The opinion of the court was delivered August 17, 1885, by

WILLIAMS, P. J.—The last question raised by the exceptions is one upon which the Courts of Common Pleas have not been uniform in their holding. It is ruled one way in 1 Pearson, 126, and just exactly the opposite rule is held in 1 Chester County Reports, 367. The mileage is charged from Knoxville to the court house by the line of the C. V. and C. C. and A. Railroads. Prior to the building of these roads the usual route from Knoxville to Wellsboro was over the wagon road, and the distance was about twenty-one miles. Since the building of the C. V. R. R. it is practicable to travel over its line to Lawrenceville, a distance of eighteen miles, and from Lawrenceville to Wellsboro over the C. C. and A. R. R., a distance of twenty-four miles further, making a total distance of forty-two miles. The rule is to compute the mileage by "the usual and ordinary route of traveling between the place of residence of the witness and the place of holding court," and it is contended that since the building of the railroads, travel between these points is as common by that route as by the wagon road, and that in this case the witnesses actually came by the cars. This is not denied. Our question then is, does the mileage of the witnesses depend on the route traveled, or is the distance between these points fixed and certain? We are of opinion that it does not depend on the election of the witnesses, but must be fixed and certain, no matter by what route or mode of conveyance the witnesses may travel. It must not be twenty-one miles to him who walks or drives, and forty-

two miles to him who rides by rail. Before the railroad was built the usual and ordinary route of travel was well established and the distance known. The building of the railroad has increased the facilities for travel, but it has not increased the distance between the residence of the witness and the court house. The old road remains what it was before—the usual route of travel for all persons using their own modes of conveyance; and it affords a natural, certain, and uniform measure of the distance and of the mileage of witnesses between these points. The new route is an additional one. Persons coming to the court house may elect over which one they will travel, but they cannot, by their election, change the distance or the compensation to which they are entitled. The "usual and ordinary route of traveling," for persons traveling by the common mode of conveyance, is that by which the distance must be computed. It may be easier to ride twice or three times the distance in the cars, but that cannot change the rule.

The exception is sustained.

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Court of Common Pleas of Luzerne County.

PETTEBONE EX'R v. BEARDSLEE *et al.*

1. Application of the rule that, in the absence of fraud and mistake, a written contract is presumed to have merged in it a previous parol agreement relating to the same subject matter.
2. On a rule to open a judgment against B. as principal and S. and W. as sureties, there was evidence that there had been a sheriff's sale of B.'s personal property; that it was worth more than the amount of the judgment; that the plaintiff bid it in at a comparatively small price; that the sureties attended the sale prepared to bid up the property to enough to protect themselves; that they announced their intention of doing so in the hearing of the plaintiff; that they were induced not to bid by the declaration of the principal debtor that the property was to be bid off by the plaintiff for a nominal sum, and that after the sale the judgment was to be cancelled—*Held*, that if the plaintiff heard these declarations and was silent, he would not be permitted to enforce collection of the judgment afterwards from the sureties.
3. Silence is interpreted as assent where a proposition is made to one which he is bound to deny or admit; so, also, it may be if he is silent in the face of facts which fairly call upon him to speak.

Rule to show cause why judgment shall not be marked satisfied.

The opinion of the court was delivered November 2, 1881, by

RICE, P. J.—The first named defendant is principal, and the last three are sureties in the above judgments. A sheriff's sale of Mr. Beardslee's personal property was had on these and other judgments, and the property bid in by the plaintiff. Subsequent to the sale a bailment was made of the property to Mr. Beardslee. The conditions of the bailment were, that Mr. Beardslee, *inter alia*, should pay to the plaintiff \$200 monthly until the payments should amount to \$7,435.91, together with interest, and that thereupon, provided the other covenants should have been kept, the plaintiff should execute a bill of sale of the property to Mr. Beardslee; but in case of failure of the latter to keep up the aforesaid payments, as well as to keep the other covenants,

the plaintiff should have the right to declare the bailment at an end, and to re-take possession of the property. The aforesaid amount which Mr. Beardslee agreed to pay represented the amount of these judgments, some labor claims and other executions which were paid out of the plaintiff's bid, and a judgment in favor of Charles A. Miner upon which an execution had been issued at the time of the sheriff's sale. It was further agreed that, in case of forfeiture of the bailment for non-payment of rents *only*, and provided he should have kept the other covenants, the plaintiff should satisfy so much of the above judgments "as the amount of money which he shall have received in rents from said Beardslee, and shall be able to realize from a sale of said newspaper" (the property involved in this controversy) "at the time of said forfeiture, shall reduce the above indebtedness of \$7,435.91 and interest from January 5, 1878, below the total amounts of said judgments." Mr. Beardslee paid on this contract \$400, but having failed to keep up the payments, and, as alleged by the plaintiff, to keep the other covenants, the plaintiff forfeited the bailment, re-took possession of the property, and subsequently sold it to Mr. Bogert and another for \$4,000. While denying the defendant's strict legal right to the application, the plaintiff concedes that the payments above made by Mr. Beardslee and the amount received from Mr. Bogert shall be applied in satisfaction *pro tanto* of the above judgments. According to the calculation attached to the depositions, such application will satisfy the first two judgments and the greater part of the third. As to the first three judgments, therefore, the rule will be made absolute as to all the defendants.

As to the last two judgments the position of Mr. Beardslee, the principal debtor, differs from that of his sureties. Conceding that prior to the sale there was a parol agreement between him and the plaintiff that the latter should satisfy the judgments in case of a forfeiture of the contract of bailment which was in contemplation, the subsequent written contract must, nevertheless, still govern. In the absence of fraud or mistake in its execution it must be presumed, as between these two parties, to have merged in it the previous parol agreement relating to the same subject matter. But, by the terms of the written contract, the

plaintiff agreed to satisfy only such proportion of the judgments as he should receive as rental, and on a re-sale of the property. Credit on these accounts has already been fully allowed on the first three judgments, in exact accordance with the terms of the defendant's written contract, and therefore the rules in the last two judgments must be discharged as to Mr. Beardslee. But how stands the case of the sureties? It does not appear in the testimony, nor do they assert, that the alleged parol agreement made before the sale, and of which Exhibit "A" is said to be a memorandum, was made with them, nor for their benefit, nor upon any consideration moving from them. If that were all there were in the case, their defense to these judgments would rise no higher than their right to enforce that agreement, and hence must fail. Even the fact that the existence of such an agreement was communicated to them, without anything more, would not give them the right to enforce it, nor furnish an equity which they could set up in discharge of their legal liability. Winter's Appeal, 11 Sm. 307. But the testimony goes still further. It is undenied that the sureties were present at the sale, and they assert that they intended and were prepared to bid up the property to enough to cover these judgments, and thus protect themselves. According to their testimony, as well as that of Mr. Beardslee, it was worth more than the face of the judgments. They testify further that they announced their intention to bid in a tone of voice loud enough to be heard by the plaintiff and his attorney, who were present. Dr. Trimmer testifies as follows: "Mr. Beardslee said he hoped we would not bid upon the property; as arrangements had been made by which the judgments were to be satisfied after the sale. This was said in the presence of Mr. Pettebone and his attorney in an ordinary tone of voice, and I think loud enough to be heard by them if they had been listening. Mr. Beardslee said that the property was to be sold and bid in by Mr. Pettebone at a nominal sum and we were to be protected by the sale. This was said by Mr. Beardslee in the same conversation in a tone of voice loud enough to be heard by them if they had been listening. We did not bid on the property in consequence of these assurances." Mr. Williams testifies as follows: "Beardslee objected to our bidding it up, and

said he had an arrangement not to bid. He went and talked to Mr. Pettebone, but I did not hear what he said to him. Then he came back and told us that it was to be knocked off at a nominal sum *for to* make a title to a stock company, and the judgments were to be cancelled. We were all in a small room when the conversation was had, and Trimmer talked pretty loud so that all could hear; I am sure I heard him, although I am somewhat deaf. I went there expressly prepared to bid the property up to cover the judgments, and would have done so only for their arrangement. I supposed they all understood the arrangement." Clearly, if the plaintiff had made these declarations to the sureties at the very time of the sale, and they, relying upon the assurances, had refrained from bidding, in consequence of which he had obtained the property at an under value, he would not be permitted to enforce the judgments against them afterwards in fraud of his agreement. The question then fairly arises whether the same effect is to be given to his silence. Before this conclusion can be reached, the fact must be clearly established that he heard the conversations and declarations. This is a fact in dispute, which, under the testimony, we do not think the court is called upon to decide. There is sufficient evidence of the fact to go to a jury along with the plaintiff's denial. But it is argued, the declarations were not made to the plaintiff, and therefore he was not called upon to answer them or to deny the truthfulness of Mr. Beardslee's assertions. The general rule, as deduced from the case of *Moore v. Smith*, 14 S. & R. 393, is, that the presumption of acquiescence from silence presupposes a declaration or proposition made *to* a man which he is bound either to deny or admit. But this general rule will not cover every case. If silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. *Day v. Cator*, 119 Mass. 516. It was the fact that the agreement to satisfy the judgments was being used at the very time of the sale to induce the sureties to refrain from bidding, and to permit the property to be struck down to the plaintiff, which fairly called upon him to speak. His silence under such circumstances would naturally be interpreted as an

assent, even though the declarations were not specifically addressed to him. On the argument of these rules they were amended to rules to open the judgments, and we have so treated them.

The rule granted January 26, 1881, is amended so as to read, "rule is granted to show cause why the five judgments above named shall not be opened and the defendants let into a defense;" and the rule is made absolute in judgments Nos. 3,335, 3,336, 3,337, September term, 1877, one issue to be framed with the notes as a declaration, and a plea of payment with leave, etc.; and in judgments Nos. 3,338 and 3,339, September term, 1877, the rule is discharged as to H. B. Beardslee, and made absolute as to the other defendants, one issue to be framed with the notes as a declaration and a plea of payment with leave, etc.

Allan H. Dickson, for plaintiff.

Garrick M. Harding, *contra*.

Ernest Jackson was born in Wilkes-Barre August 6, 1848. His father, Angelo Jackson, was born at Erie, N. Y., and was of New England extraction, and being left an orphan at an early age, his mother married for her second husband Reuben Montross, M. D., of Northmoreland township, Luzerne (now Wyoming) county, Pa. Here Mr. Jackson spent his boyhood days, and in the year 1847 graduated from Yale College. He then entered upon the study of the law, and was admitted to the bar of Luzerne county April 1, 1850. He was for some years a law partner of the late Charles Denison. In 1858 he was a candidate for prothonotary on the republican ticket against David L. Patrick, and in 1861 against William H. Pier, M. D., but was defeated in both instances. On October 20, 1861, he entered the army as first lieutenant of Company I, Fifty-Eighth Regiment Infantry, Pennsylvania Volunteers, and on June 5, 1863, was promoted to the captaincy of the company. He was mustered out with his regiment September 25, 1865. He then took a position in the treasury department at Washington, D. C., as chief of a division. He died in that city in 1874. The first wife of Angelo

Jackson, and the mother of the subject of our sketch, was Elizabeth Whitney. She was the daughter of Asa C. Whitney, M. D. Doctor Whitney was the son of Elisha Whitney, who moved to the Wyoming Valley in 1810, and went to Wysox, Luzerne (now Bradford) county, Pa., with his family in 1816. He was born in Spencer, Mass., in 1747. He married Esther Clark, of the same place, in 1782. She was born in 1763. Her father's name was Asa Clark, a school teacher by profession. She was present with General Warren's wife when she learned the sad fate of that gallant officer and patriotic gentleman. Soon after their marriage they removed to Stockbridge, Mass., and were among the first settlers of that place. They had ten children born to them between the years 1783 and 1801. Mr. Whitney was a revolutionary soldier. He died in 1832, and his wife in 1851, and both are buried in Wysox. Doctor Whitney was their second child, and married for his first wife a daughter of George Dorrance, of Kingston. He was a physician of great ability, and was the first resident physician of Kingston, and lived in a house from which the late Samuel Hoyt removed when he erected his residence. He removed there before 1817. He was commissioned in 1810 a justice of the peace for the townships of Wysox and Burlington, including Towanda, Luzerne (now Bradford) county. In 1820 he was elected register and recorder of Luzerne county. He married for his second wife Susan Inman, a daughter of Colonel Edward Inman. She was the grandmother of the subject of our sketch. Doctor Whitney's sister, Elizabeth, married J. W. Piollet, who came to America from his native France about the beginning of the present century. He was captain of a troop of horse at the battle of Marengo, and by his bravery won the favor of Napoleon, who promoted him to the position of postmaster in the Army of the Alps. He was a well educated gentleman, and settled in Wysox. Victor E. Piollet, a prominent citizen of Bradford county, is his son.

Ernest Jackson was educated in the academies of "Deacon" Dana and W. S. Parsons, in this city, and at Union College, Schenectady, N. Y., from which latter institution he graduated in 1869. He read law with William S. McLean, and was admitted to the bar of Luzerne county September 9, 1872. Imme-

diately upon his admission he entered into partnership with his preceptor under the firm name of McLean and Jackson, which continued until January 1, 1883. Mr. Jackson removed to West Virginia during the last named year and engaged in other pursuits, and but recently removed again to this city. He is the now junior member of the firm of McCartney (W. H.) and Jackson. He married, October 2, 1878, Mary Emma, daughter of the late G. Byron Nicholson, who in his lifetime was a member of the bar of this county. The mother of Mrs. Jackson was Mary A., daughter of Riley Stone, a son of John Stone, one of the early settlers of Abington township, Luzerne (now Lackawanna) county, Pa. Mr. and Mrs. Jackson have but one child living: Byron Nicholson Jackson. No man of his years is better known or better liked in Luzerne county than Ernest Jackson. As an office lawyer he has few equals and scarcely any superiors. In looking up the law in support of his client's cause he is patient, painstaking, and always sagacious. Few men know better, or even as well, how to "prepare a case," which, as all attorneys know, means the outlining of what is to be done in court as to witnesses, the questions to be asked of them, etc., and the provision of references to authorities that will provide defense for a case against attack from any quarter. Fortified with a case prepared by Mr. Jackson it is a poor lawyer who cannot go out of court triumphant, if the case be one deserving of triumph. Mr. Jackson is not much given to oratory in or out of court, though he can make a neat plea or speech when the occasion demands it. It is as a politician, however, that Mr. Jackson is best known. He is a democrat, and for years was a conspicuous figure in every campaign. He worked aggressively yet quietly, and in the doing of his work his genial face and sturdy form became familiar in all parts of the county. He was a strategist as well as a worker, and but few points of vantage were overlooked in matters of which he was given charge. He was never a candidate for office himself, but labored unselfishly and assiduously for all who were nominated regularly in a democratic convention. A few years ago he went to West Virginia to engage in the coal business, but the venture not proving satisfactory he recently returned to Wilkes-Barre and entered into a partnership with General Wil-

liam H. McCartney, since when he has eschewed politics and given his time wholly to his professional duties. It is difficult to believe that Mr. Jackson can have an enemy. He is the soul of good nature, never has an ill word to say of any body, but, on the other hand, has a smile and a kindly word for all, whereby he has achieved a personal popularity that few other men in his profession can be truthfully said to enjoy.

George Washington Shonk was born April 26, 1850, in the township (now borough) of Plymouth, Pa. He is a grandson of Michael Shonk, who was born on the ocean in September, 1790, while his father was emigrating to this country from Germany. His great-grandfather, John Shonk, father of Michael Shonk, was a nailer by trade and settled in Hope, one of the interior townships of Warren county, N. J., which derived its name from the Moravian pioneers who located there in 1769, and gave that name to the locality in which they settled. The house that he built is still standing, and his body is interred in the Moravian graveyard in that village. The place was visited the present year by John Jenks Shonk, father of George W. Shonk, and this after a lapse of sixty-one years since he left Hope. Michael Shonk removed from Hope to Plymouth in 1821, where he died in 1844. His wife was Beulah, daughter of John Jenks. In General Davis's History of Bucks County we find the following regarding the family: "The Jenkses are Welsh, and the genealogy of the family can be traced from the year 900 to 1669, when it becomes somewhat obscure. The arms which have long been in the possession of the family at Wolverton, England, descendants of Sir George, to whom they were confirmed by Queen Elizabeth in 1582, are supposed to have been granted soon after the time of William the Conqueror for bravery on the field of battle. The first progenitor of the family in America was Thomas, son of Thomas Jenks, born in Wales in December or January, 1699. When a child he came to America with his mother, Susan Jenks, who settled in Wrightstown and married Benjamin Wiggins, of Buckingham, by whom she had a son born in 1709.

She died while he was young, and was buried at Wrightstown meeting. Thomas Jenks was brought up a farmer, joined the Friends in 1723, married Mercy Wildman, of Middletown, in 1731, and afterwards removed to that township, where he spent his life. He bought six hundred acres southeast of Newtown, on which he erected his homestead, which he called Jenks hall, and built a fulling mill on Core creek, that runs through the premises, several years before 1742. He led an active business life, lived respected, and died May 4, 1797, at the good old age of ninety-seven. * * * At the age of ninety he walked fifty miles in a week, and at ninety-two his eyesight and hearing were both remarkably good. He had lived to see the wilderness and haunts of wild beasts become the seats of polished life. Thomas Jenks left three sons and three daughters: Mary, Elizabeth, Ann, John, Thomas, and Joseph, who married into the families of Wier, Richardson, Pierson, Twining, and Watson. * * * The descendants of Thomas Jenks, the elder, are very numerous, and found in various parts, in and out of the state, although few of the name are now in Bucks county. * * * Among the families of the past and present generations with which they have allied themselves by marriage, in addition to those already named, can be mentioned Kennedy of New York, Story, Carlisle, Fell, Dixon, Watson, Trimble, Murray, Snyder (governor of Pennsylvania), Gillingham, Hutchinson, Justice, Collins of New York, Kirkbride, Stockton of New Jersey, Canby, Brown, Elsegood, Davis, Yardley, Newbold, Morris, Earl, Handy, Robbins, Ramsey (governor of Minnesota), Martin, Randolph, etc. Doctor Phineas Jenks, and Hon. Michael H. Jenks, of Newtown, deceased, were descendants of Thomas, the elder."

As already stated, Beulah Shonk was the daughter of John Jenks, son of Thomas Jenks, jun. Her brother, John W. Jenks, M. D., in company with his father-in-law, Rev. David Barclay, settled in Jefferson county, Pa., in 1819. The latter laid out the town of Punxsutawney the same year. It is the oldest town in the county, and had a store long before there was one in Brookville, the county-seat. Jefferson county was organized from a part of Lycoming county by an act of the legislature approved March 26, 1804. By the thirteenth section of the same act it

was placed under the jurisdiction of the courts of Westmoreland county. An act passed in 1806 authorized the commissioners of Westmoreland county to act for Jefferson county. For many years after its establishment the county was little better than a hunting ground for whites and Indians. The first commissioners were not appointed until 1824, John W. Jenks, M. D., being one of the number. Doctor Jenks was the father of George A. Jenks, of Brookville, who occupies at present a very important position in the interior department at Washington, D. C., and also of William P. Jenks, who was for many years president judge of the courts of Jefferson and Clarion counties. In 1880 George A. Jenks was the democratic candidate for judge of the Supreme Court of Pennsylvania, but was defeated by Henry Green, the candidate of the republican party. Isaac G. Gordon, at present one of the judges of the Supreme Court of Pennsylvania, is a son-in-law of Doctor Jenks.

John Jenks Shonk was born at Hope, N. J., March 21, 1815, and is one of the most prominent business men of Plymouth. He was one of the earliest coal operators in the valley, as well as a merchant. As early as 1832 he commenced to mine coal for market, and has been engaged almost continuously in the business since. He is also largely interested in the mining of bituminous coal in West Virginia. He is the president and one of the directors of the Cabin Creek Kanawha Coal Company, and also of the Williams Coal Company, of Kanawha. He is also a director and the president of the Kanawha Railroad Company. He is the president and one of the directors of the recently incorporated Wilkes-Barre and Harvey's Lake Railroad Company. In 1875 he was the candidate of the prohibition party in the Third legislative district for the legislature of the state, and was elected by a majority of five votes over M. A. McCarty, the democratic candidate, and four hundred and nine over J. N. Gettle, the republican candidate. In 1876 he was re-elected as a republican and defeated Bryce S. Blair, his democratic competitor, by a majority of five hundred and forty-six votes. Mr. Shonk has been married three times. His first wife was Elizabeth, daughter of the late Ebenezer Chamberlain, M. D., a native of Swanzey, Cheshire county, N. H., where he was born Decem-

ber 1, 1790, and was the practicing physician of Plymouth from the time of his immigration in 1816 until his death, April 12, 1866. He was one of the commissioners of Luzerne county from 1843 to 1846, and also held for a long time the commission of justice of the peace. The second wife of J. J. Shonk was Frances Rinas, daughter of Carpenter C. Rinas, of Plymouth. Neither of the above named wives left any children surviving. The third wife of John Jenks Shonk, whom he married in 1847, and the mother of the subject of our sketch, is Amanda, daughter of the late Thomas Davenport. Colonel Wright, in his "Historical Sketches of Plymouth," speaks thus of the Davenports: "They were among the early settlers of the town, and one of them was of the original Forty. I am not able to ascertain the length of time he remained in Plymouth after his immigration. The name of Davenport is on the original list. The Christian name is so obliterated that I cannot decipher a letter of it. It was undoubtedly Robert, however, father of Thomas, who came a few years afterwards. * * * [The family is of New England origin.] The name of Conrad Davenport is upon the dead list of the Wyoming battle. The Davenport whose name appears upon the roll of the Susquehanna Immigrant Company, and to whom was allotted some of the lands still in possession of the family, came out, most likely, as an explorer; and on his return giving a favorable account of the new country, his son, Thomas, succeeded his father in the Plymouth possessions. Robert does not seem to have returned to the valley. It is also pretty well settled that he was a member of Captain Whittlesey's company in the battle, and a survivor of that terrible disaster. Such is the tradition of the family at the present time, and most likely a correct one. [Thomas Davenport, the ancestor of the now resident family, came from Orange county, N. Y., in the year 1794.] His name is registered on the assessor's list of 1796, and he was then the owner of a large landed estate. He purchased from Joseph Reynolds, of Plymouth, December 6, 1799, 105 acres of land for '65 pounds current, lawful money.' He died in the year 1812, leaving a large family—six sons and four daughters. His wife was a member of the Methodist Episcopal church of Plymouth before 1795. His sons were Thomas (father of Mrs. Shonk), John,

Robert, Samuel, Daniel, and Stephen. A considerable part of the old homestead farm is still owned by the descendants. * * The Davenports were among the substantial business men of the town for a great many years. They were of that class which, above all others, are entitled to public consideration, because they were devoted to their own affairs, and were not in the habit of meddling with those of others. They faithfully maintained their credit, and their lives were marked with strict economy, industry, and fair dealing. The six sons were all farmers." Stephen Davenport, the youngest son was one of the 'commissioners of Luzerne county from 1862 to 1865. He died but a few weeks since. The wife of Thomas Davenport, sen., was Charity Lamereux, a native of Litchfield county, Conn. She was a descendant of one of the Huguenot families of France. Her ancestor came to this country after the Revocation of the Edict of Nantes, October 20, 1685. It was then "ordered that all Protestant churches be immediately demolished; that Protestants should not assemble in any house or other place for their religious worship; that ministers were to leave the kingdom within fifteen days if they did not become Catholics. If they attempted to exercise their functions they would suffer as the vilest criminals. Parents were to send their children at once to the Catholic churches for baptism or suffer heavy penalties. But if Protestants attempted to leave the kingdom they would be sent to the galleys." It is vain to attempt to specify the numerous methods by which the Revocation made life intolerable and death welcome to the purest and noblest of the French population. "It was," says the Duke of St. Simon, a Roman Catholic courtier of Louis XIV., "a plot that presented to the nations the spectacle of so vast a multitude of people, who had committed no crime, proscribed, denuded, fleeing, wandering, seeking an asylum afar from their country. A plot that consigned the noble, the wealthy, the aged; those highly esteemed, in many cases, for their piety, their learning, their virtue; those accustomed to a life of ease, frail, delicate, to hard labor in the galleys, under the driver's lash, and for no reason save that of their religion." All this prolonged barbarity proceeded from a court equally remarkable for its æsthetic culture, its undisguised licentiousness and its piety (?).

Under the same influence, in the same century, the Austrian court was no less merciless. Bohemian Protestants were banished or caged like wild beasts, their children were declared illegitimate, their goods were spoiled. "Mothers were bound to posts with their babies at their feet, to see them die of hunger unless they should renounce their faith." All this occurred within two hundred years in the most civilized nations, and under the most religious governments (?). Doctor Lord, in his "Beacon Lights of History," says, in his lecture on Louis XIV., that "it is a hackneyed saying that 'the blood of martyrs is the seed of the church.' But it would seem that the persecution of the Protestants was an exception to this truth; and a persecution all the more needless and revolting since the Protestants were not in rebellion against the government, as in the time of Charles IX. This diabolical persecution, justified, however, by some of the greatest men in France, had its intended results. The bigots who incited that crime had studied well the principles of successful warfare. As early as 1666 the king was urged to suppress the Protestant religion, and long before the Edict of Nantes was revoked the Protestants had been subjected to humiliation and annoyance. If they held places at court they were required to sell them; if they were advocates they were forbidden to plead; if they were physicians they were prevented from visiting patients. They were gradually excluded from appointments in the army and navy; little remained to them except commerce and manufactures. Protestants could not hold Catholics as servants; soldiers were unjustly quartered upon them; their taxes were multiplied; their petitions were unread. But in 1685 dragonnades subjected them to still greater cruelties; who tore up their linen for camp beds, and emptied their mattresses for litters. The poor, unoffending Protestants filled the prisons and dyed the scaffolds with their blood. They were prohibited, under the severest penalties, from the exercise of their religion; their ministers were exiled, their children were baptised in the Catholic faith, their property was confiscated, and all attempts to flee the country was punished by the galleys. Two millions of people were disfranchised; two hundred thousand perished by the executioners, or in prisons, or in the galleys. All who could fly

escaped to other countries, and those who escaped were among the most useful citizens, carrying their arts with them to enrich countries at war with France. Some two hundred thousand contrived to fly, thus weakening the kingdom, and filling Europe with their execrations. Never did a crime have so little justification; and never was a crime followed with severer retribution. Yet Le Tellier, the chancellor, at the age of eighty, thanked God that he was permitted the exalted privilege of affixing the seal of his office to the act before he died. Madam de Maintenon declared that it would cover Louis with glory. Madam de Sévigné said that no royal ordinance had ever been more magnificent. Hardly a protest came from any person of influence in the land, not even from Fénelon. The great Bosseut, at the funeral of Le Tellier, thus broke out: 'Let us publish this miracle of our day, and pour out our hearts in praise of the piety of Louis—this new Constantine; this new Theodosius; this new Charlemagne; through whose hands heresy is no more.' The Pope, though at this time hostile to Louis, celebrated a *Te Deum*."

"The tradition in the family," says Ira Davenport, of Plymouth, now seventy-three years of age, "is that our ancestor returned to France and was put to death." The wife of Thomas Davenport, jun., was Mary Reynolds Bronson. She was the daughter of Levi Bronson, a native of Kent, Litchfield county, Conn. He was the father of Ira Bronson, who was one of the commissioners of Luzerne county from 1846 to 1849, and also one of the justices of the peace of the county for many years.

George W. Shonk was prepared for college at Wyoming Seminary, Kingston, Pa. He then entered Wesleyan University, at Middletown, Conn., from which he graduated in the class of 1873. He then entered the law office of Hubbard B. Payne, and was admitted to the bar of Luzerne county September 29, 1876. He married, August 15, 1880, Ida E. Klotz, daughter of Joseph Klotz, of West Pittston, Pa., who is a descendant of Jacob Klotz, who came to this country with his wife, *nee* Uteloch, from Wurttemberg, Germany, September 2, 1749, in the ship *Chesterfield*. He took out a warrant for a tract of land in Lowhill township, Lehigh (then Northampton) county, March 16, 1767, and another in November of the same year, lying between the site of the "Morglender church and the Jordan creek." He had two sons:

John and Casper. John Klotz, the grandfather of Joseph Klotz, married Franconia Krouse, and by her had five sons. Christian Klotz was the fourth son of John, and was the father of Joseph Klotz. He was born May 14, 1789, and about the year 1814 left his native township, and soon after settled in Mahoning township, Carbon county, where he died March 12, 1848. In 1816 he married ——— daughter of Robert McDaniel, and by her had five children. Joseph Klotz, the father of Mrs. Shonk, being the youngest. In 1848 Joseph Klotz removed to Pittston, where he has since resided. He married, November 6, 1850, Mary A. Grube, daughter of John Grube. Robert Klotz, of Mauch Chunk, Pa., who represented the counties of Carbon, Columbia, Montour, Pike, Monroe, and parts of Luzerne and Lackawanna in congress from 1878 to 1883, is a brother of Joseph Klotz. Robert McDaniel, the maternal grandfather of Joseph Klotz, was born August 24, 1756, in a small lumbering village near Penobscot, Me. He was apprenticed to Captain Joseph Longstreth, of Philadelphia, who, in 1783, purchased the Gilbert farm in Mahoning Valley, being the same place where the Indians captured the Gilbert family in 1780. The wife of Robert McDaniel was Elizabeth Hicks, a Quakeress. Mr. and Mrs. George W. Shonk have two children: Herbert Bronson Shonk and Emily Weaver Shonk. Mr. Shonk is one of the best and brightest of the younger members of the Luzerne bar. He comes of a good family, some of the members of which have been prominently identified with the political and business interests of the county. His father, as already stated, served two terms in the house of representatives at Harrisburg, where he took a live interest, and was an active participant in, the proceedings. George W.'s capacities, both as a lawyer and man of business, are of no narrow order. He never permits himself to underestimate the importance of a cause placed in his keeping, and is always prepared to defend it from every point of attack. Hence he is a close student as well as a member of the bar, as every good lawyer who expects to remain a good lawyer, must be. He is a republican in politics, and quite prominently identified with the interests of that party. He is quiet, courteous, and affable, and these qualities, added to his professional and business powers, give promise of his becoming a citizen of rare usefulness.

Clarence Winfield Kline was born October 25, 1851, near Jerseytown, Columbia county, Pa. He is a descendant of Jacob Klein, who emigrated to this country from Germany October 2, 1741, in the ship *St. Andrew*. Daniel Klein, son of Jacob Klein, was born in 1742, and served in the revolutionary war. Daniel Klein, son of Daniel Klein, was a soldier in the war of 1812, and served under General Jackson. He removed from Philadelphia to East Hempfield township, Lancaster county, in 1820. George Schenck Kline, father of C. W. Kline, was born in East Hempfield in 1826, and removed to Danville, Pa., in 1845. In 1846 he married Maranda Kisner, daughter of Jacob Kisner. He was the son of Leonard Kisner, who was the son of John Kisner, a native of Germany. Jacob Kisner was the cousin of William Kisner, of Hazleton. On the night of his marriage he left with the Columbia Guards for the Mexican war, where they participated in every battle. The Columbia Guards organized in 1817, belonged especially to Danville, and was famous all over Columbia county (in honor of which it took its name), by its connection with the Mexican war. It was mustered into the service of the United States December 28, 1846, and was attached to the Second Regiment of Pennsylvania Volunteers, commanded by Colonel Wynkoop, and afterwards by Colonel Geary, who subsequently became governor of Pennsylvania. Their first engagement was at the storming of Vera Cruz, and the second at Cerro Gordo. At the battle of Chapultepec they lost two men. On approaching the City of Mexico, the defense of San Angelos, with all the military stores, was committed to the Guards, and on September 13, 1847, they were among the first to march in triumphal entry into the city. Mr. Kline participated in every engagement. He went out as first sergeant and was promoted by gallantry to first lieutenant and brevet captain. He left a magnificent sword as an heirloom to his children, which is now in the possession of the subject of this sketch, and which bears the following inscription engraved upon its scabbard: "Presented to Lieutenant George S. Kline by General Winfield Scott for bravery and meritorious service on the battlefields of Vera Cruz, Cerro Gordo, Chapultepec, and Mexico." Lieutenant Kline had the honor to be the man who planted the American colors on the

walls of Chepultepec after three brave soldiers had been shot in attempting to do so. Captain Kline returned to Danville after the war, and first acted as clerk and then as superintendent of the old "Rough and Ready" rolling mill at that place. In 1852 he went West with a party of surveyors to lay out a railroad, and at St. Josephs, Mo., was attacked by cholera and died within a few hours. His widow is still living.

C. W. Kline, after his father's death, was taken and raised by his grandmother Kline, in Lancaster county, and in the common schools of that county he received the groundwork of his education. When thirteen years of age he left school and Lancaster county and came back to his birthplace. The next year he successfully passed an examination and received a teacher's certificate. His first school was at the old Derry Presbyterian church, in Anthony township, Montour county. He continued teaching in the winter and working on the farm in the summer until 1869, when he removed to Jeansville, Pa., and for two years was in the employ of J. C. Hayden and Company. He was then appointed principal of the Jeansville schools. In 1874 he registered as a student at law in the office of Thomas J. Foley, then practicing in Hazleton, and was admitted to the bar of Luzerne county January 10, 1877. Mr. Kline married, November 26, 1874, Jennie Lindner, daughter of Samuel Lindner, of Hazleton. Mr. and Mrs. Kline have no children living. Mr. Kline has been a school director of Hazleton, and for the last six years has been solicitor of the borough. He has been chairman and is now secretary of the republican committee of the Fourth legislative district. C. W. Kline, whose office is at Hazleton, is one of the rapidly rising young attorneys of the Luzerne bar. He controls a large proportion of the legal business of what is called "the lower end," meaning the southern portion of the county, or Hazleton region, and by assiduous exertion earns his fee and satisfies his client every time. Lawyers doing business in the smaller towns of the county do not come so conspicuously before the whole people of the county as those residing at the county-seat, but many of them are, nevertheless, equally bright and deserving, and do an equally important and lucrative business. In such towns cases of considerable importance are finally decided

in the courts of the justices of the peace, and practice in these courts is oftener a serious matter than practice in the aldermanic courts of cities like Wilkes-Barre. It is a long distance by rail from Hazleton to Wilkes-Barre, and the journey is expensive to poor litigants, who, on these accounts, prefer to have their causes decided at home by the justices, if they come within their jurisdiction, and where they are ably argued pro and con by the attorneys. A good part of Mr. Kline's practice is of this character, though he is an attendant at almost every session of the county courts representing numerous clients. He is a gentleman well read out of as well as in the law, and makes an excellent plea.

Edward Warren Sturdevant was born in Wilkes-Barre, Pa., November 12, 1854. He is the youngest son of the late Ebenezer Warren Sturdevant, also of the Luzerne bar. The mother of Edward W. Sturdevant was Lucy, daughter of Charles Huston, at one time one of the judges of the Supreme Court of Pennsylvania. Judge Huston was the son of Thomas Huston, of Scotch-Irish descent, who, in September, 1775, was appointed "lieutenant of one of the armed boats;" March, 1776, captain of the Warren; August, 1778, captain of the armed brig Convention; and in October of the same year he reported to the supreme executive council of this state that he had "taken several prizes which are not condemned." Family tradition states that he came home on furlough to his home in Newtown, Bucks county, Pa., late on a certain afternoon; his anxious, fearful wife persuaded him to retire for the night to a neighboring hill for security. He soon saw British soldiers enter his house. Presenting their bayonets to Mrs. Huston, they demanded her husband, promising protection if he would give himself up. She assured them there were none there excepting herself, her little children, and a hired boy, who stood trembling by. They ransacked the house, thrusting their bayonets into beds, closets, or wherever a man might have been. They found some fire-arms and looking at the children proposed to "kill the cursed rebels in the bud," but their leader prevented any further trouble.

Other officers who came home with Huston were taken, and were not released until the war closed. About that time the family settled near Carlisle, Pa. Judge Huston, the eldest child of Captain Thomas Huston, first entered the army, afterwards studied law, then removed to Williamsport, and finally to Bellefonte, where he died. The parents followed him to Williamsport and kept a public house on a corner northeast of the court house for many years. Captain Huston died in Williamsport in 1824, aged eighty-five years. He was blind for some years, but could distinguish any of his many grandchildren by the voice as he welcomed them while sitting in his arm chair. His wife—Jeanette Walker before marriage—was a notable housewife, robust and sprightly, making up boxes of clothing for home missionaries when seventy years old, eyes to her husband when blind, never tired of reading, and he never tired of hearing, out of the blessed Book. She survived him but two months, dying the same year, aged seventy-five years. Their youngest son, Thomas T. Huston, M. D., settled in Athens, Bradford county, Pa., where he died in 1865.

Edward W. Sturdevant was prepared for college at the academy of W. S. Parsons, in Wilkes-Barre, and then entered Lehigh University, at Bethlehem, Pa., from which he graduated in the class of 1875. He read law with E. P. and J. V. Darling, of this city, and was admitted to the Luzerne county bar June 11, 1877. He married, October 18, 1882, Mary Nicholson Stark, only daughter of the late Jasper B. Stark, of this city. Mr. and Mrs. Sturdevant have two children: Edward Warren Sturdevant and Amy Sturdevant. J. Byron Stark, of the Luzerne bar, is a brother of Mrs. Sturdevant. Mr. Sturdevant, whose ancestry are treated at some length in the sketch of his father, General Sturdevant, published in a previous number of the REGISTER, possesses talents as a scholar and a lawyer from which liberal profit, both in money and reputation, might have been realized had not the circumstances in which he was left by his father's death removed all necessity for his continuing to practice. His share of the General's estate amounts to a snug competence, and his time is now principally occupied in the management of it. He is a gentleman of unusual urbanity of manner, pleasant of speech, and popular in the best social circles.

Bernard McManus was born in Beaver Meadow, Carbon county, Pa., July 23, 1846. He is the son of the late Felix McManus, a native of Cavan, Ireland. His mother, Bridget McManus, *nee* Dolan, is still living. Mr. McManus was educated at the Millersville, Pa., Normal School, and at St. John's College, Fordham, N. Y. He read law with John Lynch, and was admitted to the Luzerne county bar November 19, 1877. Rev. Patrick McManus, who is the parish priest at Great Bend, Pa., is a brother of the subject of our sketch. Mr. McManus married, May 20, 1884, Mary McCormick, daughter of Michael McCormick, a native of Roscommon, Ireland. They have no children. Mr. McManus practiced law at Hazleton for five years after his admission, and then removed to this city where he has been in continuous practice since. Mr. McManus, coming from humblest beginnings, having few early advantages, and required from boyhood to depend upon his own labor for his livelihood, has, considering the short time he has been practicing, pushed himself forward to a very proud position at the bar. He is a man of magnificent physique (which is a matter of no small consequence when one is compelled to the drudgeries of the law), of good mind and habits of industry. He joined the profession with the understanding that it would be of no manner of use to him without work, and hard work, and in that particular possessed an equipment, the want of which will account for at least half the failures of the legal world. He is a very genial, courteous man in and out of court, and enjoys a most excellent reputation as a citizen with all who know him.

Robert Hunter Wright, of Hazleton, was born in Greenwood township, Perry county, Pa., December 4, 1841. He is a descendant of Isaac Francis Wright, a native of England, who emigrated to this country when quite a lad. He was a carpenter by trade and resided in Philadelphia until his death, which was caused by a fall from a building. He married in this country Hannah Taylor, a daughter of William Taylor and granddaughter of Isaac Taylor, of Lower Merion township, Montgomery

county, Pa. The wife of Isaac Taylor was a daughter of Maurice Llewellyn, to whom William Penn gave a deed for six hundred and forty acres of land in Lower Merion township, fronting on the Schuylkill river. Charles Wright, the only son of Isaac Francis Wright, was but three months old when his father died. His mother married for a second husband, George Mitchell, with whom she and her son Charles moved to the Eagle Hotel, in Chester county, near Morgan's Corner, where she remained as proprietress, while her husband went back to Ireland to secure the "fortune coming," with which he purchased a tract of nearly two thousand acres of land in Greenwood township, Perry county, Pa., extending from the summit of the Buffalo Hills north, and from one-half mile of the Juniata river east. Charles Wright removed to Perry county when he was ten years of age, or about 1790, and lived with his mother and step-father until he married Deborah Van Camp, which occurred in his twenty-sixth and her twenty-second year. They moved into the woods to begin life for themselves, but they did not stay long, for, possessed of a vigorous mind and a strong, healthy body, he "cleared" his way out. He was a democrat in politics, and as such was elected to the county offices of director of the poor and county commissioner for one term each. He changed his politics during the late civil war, and was ever afterwards as ardent a republican as he had hitherto been a democrat. He was a prominent member of the Presbyterian church. The Van Camp (or Van Campen) family were descendants of the Holland Patroons, and settled in the Dutch village of Esopus (now Kingston) thirty-six miles northeast of New York City. William Van Camp, the ancestor of the line, was married to Elizabeth Decker, by whom he had three children—John, Jane, and Lydia—before 1763. They were informed in the evening that Indians lurked near, meditating a midnight attack, and before 10 P. M., with whatever could be hurriedly packed on two horses, leaving behind them four cows, ten sheep, and six hogs to arrest the pursuit of the plundering savages, who sacked and burned the village before the dawn of the next day, the Van Camps were on their way through the forest toward Pennsylvania. Where they settled after this flight is not certainly known (the family stories differ),

but from the most reliable sources were said to have lived in Columbia county, along the North Branch of the Susquehanna river. How long these fugitives were unmolested is not known, but it is certain that another surprise by the savages was more successful, for Lydia was made a captive and not ransomed for a period of nine months. The children of William and Elizabeth Van Camp, after their flight from New York, were James, Alexander, Andrew, and Deborah. The latter was the wife of Charles Wright. The removal of the Van Camps from the Susquehanna took place between 1767 and 1790. They purchased the lands they owned on the Juniata river from John Anderson, jun., who obtained the warrant and had the survey made in June, 1767.

Charles Wright, jun., son of Charles Wright, is still living at Newport, Perry county, Pa. He is a farmer and is a native of Greenwood township. His wife is Eliza Jane Hunter, a daughter of John Hunter, a native of the North of Ireland. Mrs. Wright was born near Liverpool, Pa. R. H. Wright, son of Charles Wright, jun., worked on his father's farm in the summer and going to school in the winter until he was fifteen years old. He was subsequently a clerk, and when twenty years of age he attended the Bloomfield Academy. After completing his education he taught school, engaged in the mercantile business, and various other business pursuits until 1877. Bloomfield, in connection with this sketch, means a borough of that name in Perry county, the postoffice being New Bloomfield. He read law with Charles Barnett, of Bloomfield, and with Jabez Alsover, of Hazleton, and was admitted to the bar of Luzerne county March 22, 1878. He married, December 22, 1863, Kate E. Smith, daughter of the late Samuel Smith, of Bloomfield, Pa. Mr. and Mrs. Wright have children as follows: Minnie Winona Wright, now the wife of George E. Harris, of Bethlehem; Lulu Itaska Wright, Florence Adelaide Wright, and Edgar Samuel Wright. Mr. Wright is a man of good mental parts, and, having been an earnest student, is very well qualified for practice as an attorney at law. He does a fair share of the legal business of Hazleton, and his face is a familiar one in the county-courts. He has never been especially active in politics, or other than his profession, but possesses qualities that would make him popular as a public

character if he but chose to employ them with that ambition. He is as yet but upon the threshold of his professional career, which in the future, if he goes on as he has begun, will bring him enviable laurels.

BOOK NOTICE.

FEDERAL DECISIONS. Cases argued and determined in the Supreme, Circuit, and District Courts of the United States. Arranged by William G. Myer. Vol. XII., pp. 1,149. The Gilbert Book Company. St. Louis, 1885.

This volume covering the title "Crimes and Criminal Procedure," is the twelfth in the series, though, according to the order of publication only the tenth. Vols. VIII. and XI., on Contracts and Courts, are already in the printer's hands, and will both be out of press before January 10, when about one-third, or a little more, of the entire work undertaken by the publishers will be completed. We have so frequently called attention to the merits of the general plan and scope of the series, that we shall not now do more than hastily enumerate some of the sub-divisions which the bulky volume before us contains. The crimes of special interest in a report of "Federal Decisions" are, of course, those which arise under acts of congress, or those over which federal jurisdiction arises under the constitution. Among these, prosecutions for counterfeiting and forgery, offenses on the high seas (and especially piracy), violation of the revenue, postal, pension, and election laws, and polygamy very naturally occupy prominent places in the book. Besides these, however, common law offenses, such as conspiracy, homicide, perjury, and many others having also been before federal courts appear, and have devoted to them in their various phases many pages of learned judicial opinions. Criminal procedure, too, has its important topics; we allude to arrest, preliminary examination, bail, twice in jeopardy, jury, indictment, extradition, removal of causes, etc., etc. From the matter contained we can easily see that the publishers and editor must have had difficulty in limiting it to a single volume. This, too, is a merit—for how many publishers would resist the temptation to compel the profession to buy two books in place of one? We repeat our former commendations of the series.

The following persons have been admitted to the Luzerne county bar since our last list was published in 10 Luzerne Legal Register, 216:

Alfred Eugene Chapin, from Columbia county	October 19, 1881
J. H. Maize, " " "	November 25, 1881
A. K. Oswold " " "	November 29, 1881
Orlando B. Partridge, from Lackawanna county	December 1, 1881
F. H. Nichols	December 12, 1881
Henry White Dunning	June 5, 1882
George Hollenback Fisher	June 5, 1882
James Noteman Anderson	June 5, 1882
William Carrol Price, from Philadelphia county	October 14, 1882
W. E. Smith, from Columbia county	November 14, 1882
William Allison Peters	November 20, 1882
Dennis Oliver Coughlin	November 20, 1882
Joseph Moore	November 20, 1882
John Slosson Harding	November 21, 1882
Cecil Reynolds Banks, from Blair county	January 10, 1883
Charles A. Reed, from New Jersey	March 26, 1883
J. Alton Davis, from Lackawanna county	April 18, 1883
William Alonzo Wilcox " "	June 18, 1883
Cormac Francis Bohan	March 15, 1884
John P. Kelly, from Lackawanna county	May 27, 1884
Ziba Mathers	June 2, 1884
Charles Boone Staples, from Monroe county	June 11, 1884
Benjamin Franklin McAtce, from Chester county	September 3, 1884
Harry Halsey, from Philadelphia county	November 28, 1884
Henry Richard Linderman, from Monroe county	December 5, 1884
Percival C. Kauffman, from Dauphin county	February 26, 1885
Everett Warren, from Lackawanna county	May 12, 1885
Joshua Lewis Welter	June 6, 1885
Tuthill Reynolds Hillard	June 6, 1885
Samuel Maxwell Parke	June 9, 1885
Charles C. Evans, from Columbia county	June 23, 1885
Peter Aloysius O'Boyle	July 27, 1885
Daniel Ackley Fell, jun	July 27, 1885
John Butler Woodward	September 7, 1885
Henry Martyn Hoyt	September 7, 1885
Lord Butler Hillard	September 7, 1885
Henry Hunter Wells, jun	October 10, 1885
Moses Waller Wadhams	October 10, 1885
Anthony Lawrence Williams	October 12, 1885

THE LUZERNE LEGAL REGISTER.

VOL. XIV. FRIDAY, NOVEMBER 20, 1885.

No. 47

Court of Common Pleas of Luzerne County.

IN RE ACCOUNT OF A. BRYDEN, TRUSTEE.

1. An assignment in trust for certain specified creditors of the assignor inures to the benefit of all the creditors only where the assignor was, at the time, unable to pay all his debts.
2. The auditor found that at the time of the assignment, the assignor "had assets sufficient to have at once paid all her debts, and that these assets would have sold for cash for a sum sufficient to have paid all her liabilities in full."—*Held*, that the assignment was not on account of insolvency, and therefore did not inure to the benefit of all the creditors.

Exceptions to auditor's report.

The opinion of the court was delivered April 20, 1885, by

RICE, P. J.—In his original report the auditor found that the assignment of the insurance moneys to the accountant in trust for certain of the creditors of the assignor (the Pittston Knitting Company) was not on account of its inability at that time to pay its debts. His supplemental report has removed all doubt as to the basis upon which this main conclusion was rested. He now reports specifically that at the time of the assignment the Knitting Company "had assets sufficient to have at once paid all her debts, and that these assets at the time of said assignment would have sold for cash for a sum sufficient to have paid all her liabilities in full." This finding fully meets the requirements stated in our previous opinion (see *In re Bryden*, 42 Leg. Int. 80), and if it is warranted by the evidence, then the assignment to the accountant cannot be held to inure to the benefit of all the creditors, and the distribution reported by the auditor must be confirmed. The very earnest and able argument of the counsel for the exceptants has caused us to re-examine the evidence with

great care. The testimony upon this question of fact is conflicting, and it must be confessed that the opinions expressed by some of the witnesses as to the value of the assets are not entitled to much weight, for the reason that they are speculative, and involve the existence of conditions which do not appear in the facts. This remark, however, does not apply to the testimony of all the witnesses produced by the bondholders, and we are unable to declare that the auditor is clearly mistaken in his finding, much less to declare that there is no evidence whatever to sustain it. It is unnecessary to cite authorities as to the weight which must be given to an auditor's finding upon a pure question of fact. According to the familiar rule upon the subject—the court not being satisfied that a mistake has been committed—this report must be confirmed.

The exceptions to the original and supplemental auditor's reports are overruled, and the same are confirmed absolutely.

F. C. Sturges, for trustee.

G. S. Ferris, *contra*.

Court of Oyer and Terminer of Luzerne County.

COMMONWEALTH v. SMITH.

1. Consent of the prosecutor is no defense to the crime of sodomy.
2. But where the prosecutor consents he is treated as an accomplice and should be corroborated.
3. Where there is evidence tending to show his consent, and also evidence the other way, it should be submitted to the jury, and its bearing explained by the court, with the advice, if the jury should find that the prosecutor consented, not to convict on his uncorroborated testimony.

Rule for a new trial and motion in arrest of judgment.

The opinion of the court was delivered October 26, 1885, by

RICE, P. J.—The defendant was convicted of the crime of sodomy as defined in the last clause of section 1 of the act of June 11, 1879, P. L. 148. We cautioned the jury against allowing their abhorrence of this crime to prejudice them in considering

the evidence against the defendant. We also reminded them that they ought to examine and weigh the evidence with great care, because the accusation was one hard to be defended by the party accused, though innocent. At the same time we instructed the jury that if they believed the testimony of the prosecutor they could convict. It is contended that this instruction was erroneous, and that we ought to have charged that the jury could not convict on his uncorroborated testimony. The rule of the common law with regard to this crime, appears to be, that if the prosecutor consents to the criminal act he is an accomplice, and in that case the jury should, at least, be advised not to convict upon his testimony alone without confirmation. 2 Wh. Cr. L. 1161; 2 Russ. on Crimes, 698; 1 Arch. Cr. Pr. & Pl. 1016; *R. v. Jellyman*, 8 C. & P. 604; *Com. v. Snow*, 111 Mass. 411. The same rule is applicable to the crime as defined by the act of 1879. But, in order to bring the testimony of the prosecutor within the rule so as to justify the court in giving the instructions now contended for, it was essential that his consent to the criminal act should be made to appear. If this fact did not appear in the evidence, then he was not an accomplice, either legally or morally. The evidence upon this question presents two aspects. The prosecutor testifies that he was overpowered—that the defendant held him down and forced him to the act—or, as he expresses it, “at last he forced me to *have* him.” On the other hand, it appears that the place where the crime was alleged to have been committed was where he would likely have been heard had he called for help, and he made no determined outcry. After the act he lay down upon one bunk, and the defendant upon another, and both went to sleep. At a later hour he attempted to waken the defendant as he had agreed to do. He told no one of the outrage upon him for several weeks, and the first person to whom he communicated it was not his father or other members of his family, but a boy younger than himself. The prosecutor is sixteen years of age and, judging from his appearance and manner of testifying, has more than the average intelligence of youths of that age. In a prosecution for rape these circumstances would be regarded as so inconsistent with that force and want of consent which are essential to the crime, as to require the court to

instruct the jury that they ought not to convict; or, at least, to advise them that such circumstances carry a very strong presumption that the testimony of the prosecutrix as to her want of consent was false or feigned. 4 Bl. Com. *213; 2 Wh. Cr. L. 1149, etc.; 1 Arch. Cr. Pr. & Pl. 1003-4-5-6 and notes. Now, while this crime differs from that of rape, in that the consent of the prosecutor is no defense, still, inasmuch as his consent would make him an accomplice, the evidence tending to prove that fact should have been submitted to the jury, and its bearing explained by the court, with the advice, if the jury should find that the prosecutor consented, not to convict on his uncorroborated testimony, *R. v. Jelleyman*, 8 C. & P. 604. No fault can be found with the jury for rendering the verdict they did, as the case was submitted to them. We also wish it to be understood that we have no intention to cast doubt upon the veracity of the prosecutor. His candor upon the witness stand gave to his testimony very great weight. We cannot say, however, that the result would not have been different if we had given the instructions above suggested. It is true no such instructions were asked at the trial, nevertheless, in a felony so severely punishable as this, we think it was the duty of the court to present the law upon this aspect of the case to the jury without specific request so to do. (See remarks of Paxson, J., in *Meyer v. Com.* 2 Nor. 143). Again, it is not enough that we should be of opinion that the defendant was guilty of the crime, before consigning him to the penitentiary—the court should be satisfied that he was convicted according to law. Inasmuch as a legal principle of the highest importance to the defendant, in one aspect of the case, was overlooked upon his trial, we conclude that a new trial should be awarded.

While the indictment is not drawn in the precise terms of the act of assembly, we think it charges all the essential elements of the crime with sufficient certainty. The motion in arrest of judgment must, therefore, be denied.

The reasons in arrest of judgment are overruled, and the rule for a new trial is made absolute.

T. R. Martin and John McGahren, for Commonwealth.

W. H. Hines, *contra*.

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VOL. XIV. FRIDAY, NOVEMBER 27, 1885.

No. 48

Court of Quarter Sessions of Luzerne County.

IN RE BRIDGE IN NESCOPECK.

The court will refuse to approve the report of a grand jury in favor of building a county bridge, where it appears that the foreman of the jury was one of the original petitioners for the bridge.

Rule to strike off the approval by the court of the report of the grand jury.

The opinion of the court was delivered November 16, 1885, by
WOODWARD, J.—We have read with care the additional depositions submitted to us in this case, but can see no good reason in them for changing the opinion heretofore expressed, and which will be found reported in 13 Luz. Leg. Reg. 436, 3 Kulp, 196. As early as the year 1813 it was held by our Supreme court, that if one of the petitioners for a road acts as a reviewer under appointment by the court, it will be fatal to the proceedings. (See Road in Radnor and Newton, 5 Binn. 612. In the present case it is not denied that Mr. Williams, who was one of the original petitioners for the bridge, was also foreman of the grand jury which recommended that the bridge be built. This fact appears of record, and depositions as to just what share the foreman had in the deliberations of the grand jury upon the subject, do not seem to us to be entitled to much weight. It now appears, however, that the original petition for the bridge had been at one time deposited at a store in which Mr. Williams was employed, for the purpose of obtaining signatures, and also that he took an active part in fixing the amount of the appropriation to be made by the county when that question came before the grand jury. Without intending any reflection upon the purpose or motives of Mr. Williams in this matter, we remain of the opinion heretofore expressed by us, and we therefore make the rule absolute.

Agib Ricketts, for bridge.

Gustav Hahn, *contra*.

Orphans' Court of Luzerne County.

ESTATE OF WILLIAM H. MYERS, DECEASED.

1. Bills *contracted* by a guardian for necessities for his ward, but not *paid* by him, cannot be allowed as credits in his account with the ward after he becomes of age.
2. Incompetency or carelessness in the management of an estate by a guardian whereby litigation ensues between him and his ward, will be ground for a reduction of his compensation and the imposition of costs.

Exceptions to accounts of guardian of D. L. Myers and Arminda S. Rogers, minors.

The opinion of the court was delivered November 16, 1885, by

RHONE, P. J.—The exceptions to the accounts of the guardian of both wards were argued as being identical on the only questions pressed, and we therefore dispose of both cases in this one opinion. William H. Myers, the father of these wards, died in April, 1875, leaving a widow and the two above named children. The widow died about one year later, at which time D. L. was about thirteen years of age, and Arminda S. was some two years older. The children, on the death of their mother, went to make their home with their uncle, Ira Gallup, who was administrator of their father's estate. Jonathan O. Ide, the present guardian of the exceptants, was appointed about the year 1877, and about that time took charge of their estate. His account was filed in November, 1883, and to this the exceptions now before us were filed by the said wards, they having arrived at full age. These wards now both testify that there was an understanding between them and their uncle that they were not to be charged anything for board and care. On the other hand, both Mr. Gallup and the guardian testify that they had an understanding that a reasonable and proper allowance should be made for board and care. The amount to be paid was never fixed by Mr. Gallup and the guardian, and, of course, the guardian never made any payment on the account thereof. There is the usual array of testimony on the one side to show that the children's services were worth their board, and on the other side, that their services were worth nothing, or, at least, that the charge per week is small enough

to include a reasonable sum for all services. If it were proper to dispose of this case now, we should probably conclude that nothing should be allowed for board, on the ground that the children either earned their board or should have been compelled to do so; but, under our view of the law, it is not necessary for us to decide this question. The guardian has not paid these bills, and whatever contract he made with Mr. Gallup was for and on account of the wards, and they having arrived at age are now entitled to settle their own bills and liabilities for necessities. Lorenz's Appeal, 19 S. 350; Selleck's Appeal, 42 Leg. Int. 456. In the latter case the law of the case is stated as follows: "A contract by a guardian to pay for schooling and the like is the contract of the ward for and on whose behalf the guardian acts; and the guardian is not entitled to credit for the debts *contracted*, but for those actually *paid* while he continues in the trust. The ward has a right to have the debt paid, or the money from the guardian with which to pay it." The creditor, Gallup, is not a party to these proceedings, and hence would not be bound by any decree we may enter and, although we might allow a sum to the guardian for the purpose of paying the bills, he might not make the payment. For these and other obvious reasons we conclude that we have no jurisdiction over this question, and hence disallow the credit claimed and sustain the exception. This conclusion strikes from the credits claimed out of the estate of D. L. the sum of \$170.50, and out of the estate of Arminda S. the sum of \$162.50.

The first exception relates to the amounts received by the guardian from the administrator and is dismissed in both estates, as the evidence taken and filed November 7, 1885, clearly show that this accountant has charged himself with all that he received, or ought to have received.

The second exception in both cases is not sustained, and is dismissed for the reason that the amount of interest allowed by the guardian's account is but a trifle, if any, too small, even under a very strict calculation. The fund came into the hands of the guardian in small sums at divers times, and the disbursements were of a like character, so that it is found impractical to compute a clear interest account. This mode of keeping accounts

and of managing an estate cannot be commended, and as a part compensation for unproductive funds we make a reduction in the commissions allowed the accountant.

The only other exception relied upon by counsel at the argument is the one relating to the compensation claimed by the guardian. The entire estate of D. L. is \$1,737.30, and the compensation demanded in his case is \$125 with \$25 as counsel fees; the estate of Arminda S. is \$1,617.30, with a charge of compensation of \$100 with \$25 as counsel fees. This fund came to the guardian either as cash, or as notes, judgments, or other evidences of debt. There is no evidence showing anything more than an ordinary receipt and disbursement of the money. Little or no care was bestowed upon the children's personal welfare. The estate has not been judiciously managed, and the whole carelessness of the guardian has made litigation necessary, involving great expense of counsel fees to the wards and delay in the enjoyment of their estates. Under all the circumstances we see no reason for allowing more than \$50 in each case as a fair and reasonable compensation. This basis strikes from the credits in estate of D. L. \$75, and in estate of Arminda S. \$50, on this item or exception. (See Stehman's Appeal, 5 Barr. 413; Selleck's Appeal, *supra*.) We are obliged to charge the costs of this proceeding to the guardian, for the reason that his unfaithful management of the estates occasioned them, as pointed out above. Incompetency or carelessness in the management of a trust estate is often as disastrous as downright dishonesty. In this case no attempt at fraud is intimated, but the contest has certainly been occasioned by the faults of the guardian, and consequently the expenses must fall upon him. The remaining exceptions were abandoned on the argument.

Therefore, in the estate of D. L. Myers, we refuse credits of \$170.50 on board and care, and \$75 on commissions, in all \$245.50; and in estate of Arminda S. Rogers we refuse credits of \$162.50 on board and care, and \$50 on commissions, in all \$212.50; and direct that the accountant pay the costs of this proceeding.

F. M. Nichols and E. Robinson, for wards.

T. H. B. Lewis, for guardian.

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FRIDAY, DECEMBER 4, 1885.

No. 49

Orphans' Court of Luzerne County.

ESTATE OF DANIEL TUBBS, DECEASED.

1. Nothing will be allowed a guardian for past support after the ward arrives at fourteen years of age, unless he be sent to school or a trade, or other special circumstances warrant it.
2. Allowance for past support may be made under proper circumstances, but a previous order should be obtained where any considerable sum is being expended.
3. Where a child lives with its near relatives as a member of the family there is no implied promise that anything is to be paid for labor done, unless some sort of a previous contract be shown.

Exceptions to final account of guardian of Judy E. Tubbs, a minor.

The opinion of the court was delivered September 27, 1884, by

RHONE, P. J.—I. The father of this ward died in June, 1865, leaving a widow (Felicia) and three children: William E., Judy E., and Joseph C.

II. She married Henry W. Moore in 1868, at which time her pension ceased, and it was transferred to her three children, of whom Peter Keck, this accountant, was appointed guardian. He drew the first installment of pension November 20, 1869, amounting to \$84, and from thence \$14 every quarter until September, 1874, and \$18 per quarter from that period until November 27, 1876, when the ward arrived at sixteen years of age. Total amount received \$528.87, wherein is an admitted error in the account of \$7.05. This comprises the ward's entire estate.

III. The accountant claims credit for various items of expenses amounting to \$33.31, and commissions \$26, in all \$59.31, which are not questioned. The balance he claims in his account was paid by him to the ward's mother for her (the ward's) maintenance, etc. The guardian now claims and testifies that his account is erroneous in so far as it alleges payment to the mother

prior to September, 1871, amount \$192.44, and claims the credit for this sum himself for the support of his ward from June, 1865, the date of the father's death, until September, 1871, when the ward went to live with her mother.

IV. The ward had her home chiefly with the guardian, who is also her maternal grandfather, from 1865 to 1871, as just stated, and at the last named date she was taken by her mother, where she made it her home until April, 1877, when she married George Clewell.

V. The substance of all the exceptions is, that neither the guardian nor the mother should be allowed anything for the support of the ward. Neither the guardian nor the mother of the ward nor the ward's step-father had any means beyond a house to live in and a precarious sort of ownership over a few goods; in other words, they were not of sufficient ability to support the child in idleness nor luxury. The child lived with them as a member of the family, working at such things as they required of her, and attending a country common school during the winter months. She seems to have been a healthy child and visited but little. After she became about fourteen years of age she was about six months learning the tailoring trade, and three months at dressmaking, two months of which time she earned her board, and the rest of the time she boarded at home. She also worked some as a servant for the neighbors during the last two years before she became sixteen, for which she received her board and a dollar and a quarter a week as wages. Moore, the step-father, deserted the family in 1875. He was a carpenter by trade, but thriftless.

VI. There was an understanding between the guardian and the mother from the beginning, that the pension should be used for the support of the child, although neither kept any account whatever with the ward.

VII. There was something said by the paternal grandmother about keeping the child free of charge, but this was in 1865 or 1866; at any rate, it did not amount to an offer to the guardian, after the pension was received, of such a character as to be relied upon. The child lived with her paternal grandparent somewhat in 1866.

VIII. The child knew nothing about being charged for her board, and it seems that for the last two years she was told by her guardian that she was not, but that her money was being invested in the lot on which her mother and the family were living. It now seems that the lot is in the name of the ward's two brothers, and they claim it as their own.

IX. There was never any order of court for an allowance for the ward's support.

Such are the material facts.

I. The matters of law involved are in no sense more difficult than are usual in such cases. The rules of law are based upon the merits of each particular case, but it is difficult to make the application where a parent is the guardian, for the duty of parent and guardian become quite interwoven.

II. It is not the duty of a widowed mother, with small, inadequate means, to support and educate her minor children, if they have an income, and it is the duty of a child living with its mother to assist her in the work of the household. *Strawbridge's Appeal*, 5 *Wharton*, 568. A minor's estate cannot be taken, however, to assist in the support of her mother, nor in the rearing of the younger members of her family. So far as a minor's estate is concerned it must be held strictly for her own use, no matter how pressing may be the necessities of her relatives. The mere fact that a parent or step-father or grandparent has maintained a minor child or grandchild in his own household, raises no presumption that they are entitled to any compensation. And where a child lives with its near relatives as a member of the family, there is no implied promise that anything is to be paid for labor done. In neither case can any allowance be claimed, unless some sort of a previous contract be shown. *Seitz's Appeal*, 6 *Norris*, 159; *Douglas's Appeal*, 1 *Norris*, 169. It is also true that where a guardian takes his ward, who is a relative, to live with him as a member of his own family and treats him as one of his own children, he is not entitled to a credit in his final account for the child's support, without there being shown some previous intent and understanding to have compensation. *Horton's Appeal*, 13 *Norris*, 62. In this case we have found as a fact that neither of the claimants were able

to support the child gratuitously, and that it was clearly understood by the mother, the grandfather, and other relatives that the pension was being used for the child's support. Under these circumstances we feel at liberty to allow such sums for the support as to us seems equitable and proper. The compensation demanded is certainly not extravagant, amounting to only about one dollar a week for board, clothing, doctor bills, etc. No matter what children may think, every parent knows that their work does not compensate for their maintenance before they are twelve or fourteen years of age under any conditions in life. We have before held that nothing would be allowed by us in ordinary circumstances for maintenance after the ward arrives at fourteen years of age, unless he be sent to school or a trade (*Fessenden's Appeal*, 1 Kulp, 139), and we have seen no reason for changing this rule. An allowance for past support may be made under proper circumstances, but a previous order should always be obtained, so as to avoid just such cases as this. *Pennock's Estate*, 32 Leg. Int. 169; *Meixell's Appeal*, 1 Pitts. R. 235.

The amount to be allowed must of necessity rest in the discretion of this court, and in this case we deem it proper to allow the sum claimed by the accountant, except as to the last two years. After the ward became fourteen years of age she either earned her support and clothes, or should have been obliged to do so. From the testimony we conclude that she did earn her living and bought her clothes with her wages. We, therefore, refuse the credit claimed from March 3, 1874, to March 3, 1876, inclusive, amounting to \$152.00, and add interest thereon from March 3, 1876, to September 27, 1884 (eight years, six months, twenty-four days), \$78.12. From this deduct amount due guardian as per account, \$54.87. Total balance due ward, \$175.25. As the guardian kept no account and demanded no order of allowance from the court until now, he is responsible for this proceeding, and we direct that he pay the costs thereof.

E. B. Yordy has a few more Court Rules left. They contain the rules of the Common Pleas, Orphans' Court, Quarter Sessions, Supreme Court, and Equity.

THE LUZERNE LEGAL REGISTER.

VOL. XIV. FRIDAY, DECEMBER 11, 1885.

No. 50

Court of Common Pleas of Luzerne County.

IN RE GATES.

1. In proceedings against a member of the bar for misbehavior or misconduct in office as an attorney, the fact that the charges preferred are criminal in their character, does not make it necessary for the court to await the result of a trial in the Quarter Sessions, before proceeding to disbar or suspend.
2. The statutes and the adjudicated cases show that an attorney at law is an *officer of the court*, and that for misconduct or misbehavior in office, he may be suspended from practice, or stricken from the rolls.
3. The records of our courts are judicial memorials of the highest character, and are to be sacredly guarded by the officers of the court, as well as by the officials having them in their special charge.
4. The relations of attorneys to the court and to the client, and their obligations in these relations, considered and discussed.
5. The evidence of an accomplice or *particeps criminis* is within the lines of competent proof, but is looked upon with suspicion, and requires corroboration.

Rule upon Q. A. Gates, Esq., to show cause why he shall not be disbarred or suspended.

The opinion of the court was delivered December 7, 1885, by

WOODWARD, J.—Upon the filing of a petition signed by John T. Lenahan, Henry A. Fuller, and J. Vaughan Darling, Esqs., as a committee of the Wilkes-Barre Law and Library Association, together with a copy of certain specifications and charges, this court, on July 27, 1885, granted a rule on Q. A. Gates, Esq., a member of the bar, to show cause why he shall not be disbarred or suspended from the practice of the law.

The charges are, first, mutilation and abstraction of a record in the office of the prothonotary of the county, by detaching from an execution and withdrawing from the files a certain receipt, satisfying a judgment in favor of his client; and secondly,

embracery, by unlawfully attempting to bias the mind of a juror empanelled in a certain civil action in said county, wherein he, the said Q. A. Gates, appeared for one of the parties.

It is to be observed at the outset that these charges are criminal in their character. In regard to the first, it is provided by section 15 of the act of assembly of March 31, 1860, Pur. 405, pl. 21: "If any prothonotary, clerk, register, public officer, or other person shall fraudulently make a false entry in, or erase, alter, secrete, carry away, or destroy any public record, or any part thereof, of any court or public office of this commonwealth, such person shall be guilty of a misdemeanor, and, on conviction, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment by separate or solitary confinement at labor not exceeding two years."

The second charge is that of embracery, which is thus defined by section 12 of the same statute, Pur. 404, pl. 17: "If any person shall attempt to corrupt or influence any juror in a criminal or civil court, or any arbitrator appointed according to law, by endeavoring, either in conversation or by written communication, or by persuasion, promises or entreaties, or by any other private means, to bias the mind or judgment of such juror or arbitrator as to any cause pending in the court to which such juror has been summoned, or in which such arbitrator has been appointed or chosen, except by the strength of evidence or the arguments of himself or his council during the trial or hearing of the case; he shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding five hundred dollars, or suffer an imprisonment not exceeding one year, or both or either, at the discretion of the court."

The respondent, by his counsel, asks us to hold, that as the charges against him are criminal in their character, and such as are forbidden by statute under a penalty, the court can have no jurisdiction to entertain proceedings against him as an attorney and officer of the court, until after his indictment and trial in the Quarter Sessions, for the offenses specified. The question thus presented must be first considered.

In England it was ordained by statute 4, Henry IV., C. XVIII., "that all attorneys should be examined by the justices, and by

their discretions their names should be put in a roll." They were to be good and virtuous and of good fame; and if they appeared to be such, they were to be received and sworn well and truly to serve in their *offices*. Reeves' History English Law, Vol. II., 499.

The general assembly of Pennsylvania for the years 1721-1722 passed an act entitled, "An act for establishing courts of judicature in this province." Section 28 of this act provides, "that there may be a competent number of persons of an honest disposition and learned in the law admitted by the justices of the said respective courts to practice as attorneys there; who shall behave themselves justly and faithfully in their practice. And if they misbehave themselves therein, they shall suffer such penalties and suspensions as attorneys at law in Great Britain are liable to in such cases." 1 Sm. Laws, 131. The mode adopted in England for the punishment of attorneys for misconduct is by attachment and, in very gross cases, by striking them off the roll. (See Arch. Pr. 26).

By the act of April 14, 1834, entitled an act "relative to the organization of the courts of justice," P. L. 354, "it is enacted that the judges of the several courts of record of this commonwealth shall respectively have power to admit a competent number of persons learned in the law to practice as attorneys in their respective courts." Section 73 of this act provides, "if any attorney at law *shall misbehave himself in his office of attorney*, he shall be liable to suspension, removal from office, or to such other penalties as have hitherto been allowed in such cases by the laws of this commonwealth."

In the case of Austin and others decided by our Supreme Court in 1836, and reported in 5 Rawle, 203, it was said by Chief Justice Gibson, "an attorney at law is an officer of the court."

* * * "Such officers may, and sometimes do, forfeit their professional franchise by abusing it, and a power to exact the forfeiture must be lodged somewhere. Such a power is indispensable to protect the court, the administration of justice, and themselves."

In Dicken's case, 67 Pa. St. R. 177, it was shown that a member of the bar had undertaken to make his opponent drunk, in

order to take advantage of him upon the trial of a cause in court. The Supreme Court say: "This was a wicked act, as well as one which struck directly at the due administration of justice. In its effect and criminal purpose it differs none from tampering with a juror, corrupting a witness, or bribing a judge." * * "The man who can do this is unfit to practice in a court where justice is administered, and should be expelled from the bar, or at least should be suspended from the practice until he has shown by sincere amendment that his offense is thoroughly purged."

In the Philadelphia case of Lucas Hirst and Jared Ingersoll, 9 Phila. 216, two rules were granted, one that respondents should answer for a contempt of court, the other to show cause why they should not be disbarred. The first rule was discharged, and an order made that a certified copy of the evidence be transmitted to the district attorney. In disposing of the second rule the court say, "where an attorney undertakes to obtain bail for his client, he will be held responsible for any fraud or deception on the court in obtaining and justifying the bail." * * "In view of all the circumstances, we are unable to acquit him, (Ingersoll) of malpractice, and therefore make the rule to strike his name from the list absolute." Judge Hare, in his opinion, said further, "the office of an attorney is a privilege which is obtained through an order of the court, founded on evidence that he possesses the requisite learning, and is of good moral character. And, as he obtains admission through the court, so it is the right and duty of the court to remove him if it appears from his subsequent conduct that their confidence was ill-placed."

In Samuel Davis's case, 93 Pa. St. R. 116, the attorney was professionally employed by his client to procure for her a bond of \$100 from the Trust Company. He obtained it, but instead of delivering it to her, he pledged it to one Hunphreys as security for money borrowed of the latter. The bond was frequently demanded, but without success. Having disregarded all his promises the client made an affidavit before a magistrate, and he was arrested for embezzlement, and gave bail for his appearance at court. After this, and after application to the Board of Censors of the Law Association, a settlement was made between the

counsel and his client, she consenting to the entry of a *nolle prosequi*, and a release of all claims. It was contended that this settlement operated as an absolution and remission of the offense. The Supreme Court, however, sustained the court below in striking the attorney off the roll, and in speaking of the argument say, "this view of the case ignores the fact that the exercise of the power is not for the purpose of enforcing civil remedies between parties, but to protect the court and the public against an attorney guilty of unworthy practices in his profession."

In the case of Steinman and Hensel, 95 Pa. St. R. 220, the respondents were disbarred in the court below for misbehavior in their office as attorneys. This judgment was reversed by the Supreme Court because, as editors of a newspaper, they were held protected by the Bill of Rights, of the constitution of 1874, which provides that "no conviction shall be had in any prosecution for the publication of papers relating to the official misconduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury." The Supreme Court find in the statement of the judge in the court below, conclusive proof that the publication was not made maliciously or negligently. In the course of his opinion, Sharswood, C. J., says, "no question can be made of the power of a court to strike a member of the bar from the roll for official misconduct in or out of court." His remarks in reference to the necessity of an indictment, trial and conviction of crime, as a condition precedent to summary proceedings for disbarment, are to be understood as applicable to crimes committed by the lawyer as an individual, and having no connection with his professional relations as an officer of the court.

The statutes and the adjudicated cases to which we have now called attention, seem to establish the truth of the proposition that an attorney at law is an officer of the court, and that for offenses amounting to misconduct or misbehavior in office, he may, in the discretion of the court, be either suspended from practice, or be disbarred and stricken from the rolls. And, if this be true, then it would seem clear that where the misconduct

amounts to a crime, but has been perpetrated in the professional relation, and in violation of the professional oath, which requires "all good fidelity, as well to the court as to the client," the courts are not bound to await the result of an indictment and trial by jury. And this view of the case is entirely consistent and reconcilable with the other proposition, that where the criminal offense is entirely extra professional, and was not committed by a lawyer acting as such, or because of any relation existing between counsel and client, there should be no prejudgment of the case by summary proceedings.

The specification under the first charge in the case before us, seems to be fully sustained by the evidence contained in the depositions of the witnesses, and by the record itself. It may be thus stated: In the month of November, 1880, a *testatum* writ of *feri facias* to the sheriff of Lackawanna county was issued upon a judgment in Luzerne county, against one E. E. Hendrick, in favor of one E. E. Thomas, who was the client of Mr. Gates. While this writ was in the hands of the sheriff, the parties effected a settlement, and Thomas gave to Hendrick a receipt in full satisfaction of the writ. This paper the sheriff attached to the writ as part of his return, and it was then returned to the office of the prothonotary of Luzerne county. While the writ remained in the office, but before the receipt and satisfaction had been entered on the proper docket, Mr. Gates, without any permission or right so to do, detached the receipt from the writ, thus withdrawing it from the files, and retained it for a considerable time in his possession, during which time he caused an *alias* writ to be issued. An affidavit of these facts subsequently resulted in a rule to open the judgment, and an issue to try the question of the satisfaction of the judgment.

The respondent does not deny the material allegations thus specified, but seeks to explain and, to some extent, justify his conduct. He alleges that the receipt was given by his client under a misapprehension; that it did not fully express and set forth the character of the settlement made between the parties; and that he feared the paper might be removed or tampered with by the adversary party, so as to injure his client's interests. For these reasons he took possession of the paper and retained it in

his keeping, but, as he alleges, made no secret of the fact, and was always ready to produce it, and did produce it in court when wanted on the hearing of the rule to open judgment, and at the trial of the issue.

We have already called attention to our statute in reference to the alteration, carrying away, or destroying of public records. The severity of the penalty imposed, indicates properly the estimate which experience has sanctioned, of the offense itself. Mutilations or destruction of public records constitute a crime against the peace and good order of society. And the reason of this is obvious. The records of our courts contain the best, and often the only, proofs of all legal proceedings and administration of the laws. In the language of Sir Edward Coke, they "import in themselves such uncontrollable credit and verity, as they admit of no averment, plea, or proof to the contrary." Hence the records of our courts of justice are regarded as judicial memorials, which are to be sacredly guarded by the officers chosen for that purpose, as well as by all others whose official relations to the courts give them a restricted access to legal documents for purposes of examination. The Sibylline books of ancient Rome were not more intimately connected with the political and religious history of the Roman people than are our court records with all that pertains to our rights of person and property, as citizens of a free state. The jealous, although superstitious, care, with which the Romans watched over those mysterious volumes, may well be emulated by us in protecting the records of our courts from reckless vandalism, or willful and crafty spoliation.

In addition to the explanation of his conduct given by the respondent himself, and contained in the testimony, it was suggested by his counsel, in argument, that his action in detaching and removing the receipt, was the result of a zeal in behalf of his client which, in its worst aspect, was merely a mistake. We are pointed, also, to the fact that, as no personal or sordid interest was to be subserved, his motive could not have been corrupt. And, while such considerations have force, and are not to be disregarded in the final disposition of the case, it must not be forgotten that we are dealing with a question of unprofessional

conduct, wherein motive is not the vital point. A member of the bar, as an officer of the court, owes a duty to the court, to the profession, and to himself which no client or case can justify him in forgetting. The fidelity due the client is fully vindicated when he has served him with his best learning and ability, in channels which are clear and pure. His obligations to the high and honorable profession of which he is a member, forbid any resort to chicanery and artifice, which must succeed, if at all, as do the tricks of the juggler—by eluding the sight, and cheating the judgment.

It only remains for us to say that, in our judgment, the respondent is guilty, under the evidence, of the first charge preferred against him in the complaint filed in this case.

The second charge against the respondent is embracery, by unlawfully attempting to bias the mind of a juror empanelled in a certain civil action in said county wherein he, the respondent, appeared for one of the parties. This charge is more fully set forth in the specification contained in the complaint, as follows :

"At the January term of the Court of Common Pleas of Luzerne county, a jury was empanelled for the trial of a certain action wherein one Edward Loughlin was plaintiff, and one J. S. Miller defendant; No. 477 February term, 1871. Q. A. Gates, Esq., appeared for the defendant, and during the trial caused information to be conveyed privately, by one William W. Pritchard, to Robert Vanhorn, one of the jurors, that upon a previous trial of the same case, the jury disagreeing stood eleven to one in favor of his client."

We have heretofore referred to the definition of embracery, as contained in our statute of March 31, 1860. It is said that "every one commits the misdemeanor called embracery who, by any means whatever, except the production of evidence and argument in open court, attempts to influence or instruct any juror, or to incline him to be more favorable to the one side than to the other, in any judicial proceeding, whether any verdict is given or not, and whether such verdict, if given, is true or false." Steph. Crim. L. Art. 128.

We must now turn to the testimony in the case. W. W. Pritchard testifies as follows: "I went into Gates's office to do

some other business. He was counsel in some of these suits I was interested in, and I went over there to see him about it, and the conversation turned on this suit of Loughlin's and Miller's by some means or other, I don't know how. Mr. Gates gave me an outline of it—brief synopsis of it—very short, however, and then asked me—just previous to my leaving he said, 'I would like to get information conveyed, or news conveyed'—first place he asked me if I thought Bob Vanhorn could lead his jury, and I told him I thought he might, he was a pretty good sort of a man. He said he would like to get the information conveyed to Bob Vanhorn that in a previous trial of the cause the jury stood eleven to one in his favor. I didn't give him much reply. Finally he asked me if I would communicate that to Mr. Vanhorn; and I told him possibly I might. I don't remember that I gave him any direct assurance that I would do so; but at any rate I went out, and he followed me just to the steps—just to the entrance where I came out—and I went up the street, turned the corner, and went out towards the Square, and the first man I recognized was Mr. Vanhorn. He was going in the same direction, right ahead of me, and I overtook him, and I spoke to Mr. Vanhorn, and I said, 'Bob, Gates wants me to tell you—or wants you to have understood, or some words to that effect—that on his previous trial of this case the jury stood eleven to one in his favor.' I says, 'what do you think about that?' And Mr. Vanhorn gave me some evasive sort of reply; I don't know what it was—some little profanity mixed with it too, I guess—and passed on over towards the court house. That was all the conversation."

Robert Vanhorn, the juror, testifies, "as I was going from the Courtright House to the court house, Mr. Pritchard came up with me somewhere on the way, and told me that Gates wished me to know, or wanted me to know, that that case had been tried once before, and the jury stood eleven to one in favor of his client, Mr. Miller. Question. What else was said? Answer. Well, I gave him to understand I didn't care what any other jury had done with it, and left him."

General W. H. McCartney testifies as follows: Q. Do you remember the case of Loughlin v. Miller, tried at the January term of court this year? A. I remember there was such a case

in court ; yes, sir. Q. Where were you when the jury was being called in that case ? A. While the jurors were being selected I sat in the court room talking with Mr. John T. Lenahan. Q. Did you have any conversation with Mr. Gates at that time ? A. Yes, sir. Q. What was it ? A. Mr. Gates came from the defendants' table, I think, over to me, and asked me whether he should keep Mr. Vanhorn or strike him off, or words to that effect. I replied, as between you and Mr. Palmer, I would advise you to take him. Q. During the progress of that trial did you have any other conversation with Mr. Gates that you remember ; if so, where, when, and what was it ? A. Some time subsequent to that I was coming out of the entrance to the building where Mr. Gates has his office, and met Mr. Gates. I think I said to him, I see that you have got, or took, Bob Vanhorn. He replied that he had. Mr. Gates then said either I wonder if I could get word to Vanhorn how the jury stood before, or I would like to get word to him how the jury stood before. He said it one way or the other—substantially that—and I made no reply. Mr. Gates then said, I wonder if Mr. Pritchard could be got, or induced, to post Vanhorn, or inform Vanhorn, how the jury stood before ? My recollection now is, that I was non-committal in my reply, and I said, ' Well, Gates, I don't know about that.' I think that is substantially the conversation."

There is a large amount of testimony before us upon collateral matters, such as dates, places, and circumstances. We do not think it necessary to recite it here. The main facts relied upon by the complainants are contained in the testimony to which we have called attention.

Leaving out of view, for the present, the testimony of the respondent in his own behalf, or noticing it only so far as to say that it amounts to a positive denial of the material portions of Pritchard's, we come to the consideration of the case as it stands upon the evidence for the complainants, and the rules of law applicable to that evidence

According to his own testimony Pritchard acted as an accomplice of the respondent. He voluntarily, and without having any interest, approached a jurymen who was a neighbor and relative, and communicated to him information calculated to influ-

ence his action in favor of Mr. Gates's client. And this criminal act on his part was performed at the simple request of Mr. Gates, the attorney in the case. Subsequently, he became the informer and principal witness in the proceedings against the respondent. Independent entirely of his impeachment as a witness, by the testimony of the numerous acquaintances who swear that his reputation is bad, there certainly is nothing in his relation to the case before us to call for the relaxation of the strict legal rule in regard to the testimony of an accomplice. And the rule is, that while the evidence of a *particeps criminis* may be admitted, and comes within the lines of competent proof, it is always to be looked upon with suspicion, and as requiring satisfactory corroboration. This is well stated by Judge Morton, in a Massachusetts case, quoted with approval by Greenleaf, Vol. I., page 501: "It is competent for a jury to convict on the testimony of an accomplice alone. The principle which allows the evidence to go to the jury necessarily involves in it a power in them to believe it. But the source of this evidence is so corrupt that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation. Hence the court ever consider it their duty to advise a jury to acquit, when there is no evidence other than the uncorroborated testimony of an accomplice." The same rule existed in the civil law of Rome, and its spirit is expressed in the maxim, *Nemo allegans suam turpitudinem, est audiendus*.

And the corroboration must be of matters material in the case at issue. We quote again from Judge Morton: "We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial." (See, also, Roscoe's Crim. Ev. 120; *The People v. Costello*, 1 Denio, 83.

Now, the material and all important questions of fact in the present case, is this: Did the respondent request and induce Pritchard to communicate to the juryman, Vanhorn, the fact that the former jury stood eleven to one in favor of his, the respond-

ent's, client? The respondent admits that he had a conversation with Pritchard, and that, in answer to a question by the latter, he informed him of the result of the first trial. But he denies that he asked him to communicate the fact to Vanhorn. The only witness who testifies on this point is Pritchard himself, and his credibility, therefore, is to be considered with the greatest possible care. The testimony of General McCartney, describing the interview with the respondent, no matter at what particular hour it occurred, shows conclusively that Mr. Gates had in his mind a desire to possess Vanhorn with the information of the result of the former trial of the case. Admitting everything to be true as claimed by the respondent, in explanation and extenuation of his conduct, the fact still remains that it was entirely unprofessional conduct, and such as to call for our emphatic disapproval and rebuke. All efforts by counsel to influence the verdict of a jury, except such as are legitimately made in open court, are not only immoral and corrupt, but are also indicative of a very low standard of professional honor and obligation. A lawyer should not be a "jury fixer." The opposite view, if carried into practice, would render the trial by jury little better than a solemn farce; and the profession of the law, instead of being a sphere for the exercise of the best intellect, the soundest morality, and the most uncompromising honor, would soon become little better than a harbor for pirates, or a den of thieves.

But, while this testimony is of sufficient importance to justify the comment we have felt called upon to make, it falls short, in a strictly legal aspect, of corroborative proof. It is not irreconcilable with the respondent's innocence of the specific charge contained in the complaint. And the necessity of corroboration, in the present instance, does not rest solely on the fact that, by his own admission, Pritchard was an accomplice and *particeps criminis*. Twenty-four witnesses, on behalf of the respondent, swore that Pritchard's reputation for truth and veracity, from the speech of people, was bad. Some of these witnesses went further, and describe him as a man notorious for promoting strife, and as a blackmailer. This is an impeachment of no ordinary character, and there has been no attempt to rebut or controvert it. We must, therefore, for all the purposes of the present inquiry, assume it to be true.

The testimony of Vanhorn confirms and corroborates Pritchard, so far as concerns his own criminal conduct in seeking to improperly influence the mind of a juror, but it throws little, or no light, on the question of the guilt or innocence of the respondent himself.

Nor are we to forget that every tribunal before which a man is tried for a criminal offense, owes implicit obedience to the benign maxim of the law, which presumes innocence until guilt is proved. Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion. Greenleaf, §34.

In conclusion, we say that, after a careful consideration of the evidence in the case, we are of the opinion that the respondent is not guilty of the second charge contained in the complaint. The finding and judgment of the court, therefore is, that the respondent is guilty of the first charge, and not guilty of the second charge. And the sentence of the court is, that Q. A. Gates be suspended from practice as a member of the bar for the period of six months.

John Lynch and E. S. Osborne, for respondent.

Orphans' Court of Luzerne County.

ESTATE OF HANNAH JANE WELCH.

The usual commissions allowed in proceedings to sell real estate in partition are two and one-half per cent., and not five per cent., as in cases of general administration of personal estates.

Exceptions to account of administrator, who made sale of real estate under proceedings in partition of real estate.

The opinion of the court was delivered June 11, 1877, by

RHONE, P. J.—The first exception filed by Seibert Welch is sustained. There should be but one account in such case as this. The accountant will always be protected by the court in the distribution from any liability for moneys not yet due. This item

of \$1,762.94 is therefore stricken from the credit side of this account. Said Welch's second exception is not sustained as stated, but the question therein raised is disposed of as follows: Commissions are allowed for this double purpose only, 1st, for labor and trouble; 2d, for risks in handling the funds. Expenses are not properly embraced in what are allowed as commissions. The law allowed expenses long before it allowed commissions. Scott, 552. The commissions in such cases as this have been pretty uniformly fixed at two and one-half per cent., and not five per cent., as in cases of general administration of personal estates. Eshleman's Estate, 24 Smith, 42; Clark's Estate, Leg. Int. 9 Apl. 1875; Skinner's Estate, 4 Phila. 189. His fourth exception raises a question of fact, and is dismissed because there is no evidence to sustain it. The exceptions filed by the attorney for the heirs are substantially the same as those already disposed of, and therefore require no further notice, except to remark that the addenda to the account showing payments to the heirs is no part of the account, and evidently was not intended as such.

We, therefore, add to the balance shown by the account in the the accountant's hands the following sums: Purchase money, \$1,762.94; excessive commissions, \$68.66; in all, \$1,831.60, which sum makes \$2,395.51, and judgment is entered for this sum. The costs of this proceeding are to be paid out of this estate.

What old Rastell says in the following passage is strictly true "This book entituled a collection of entrees, contayneth the forme and maner of good pleading, which is a great part of the cunning of the law of England, as the Right worshipfull and great learned man Syr Thomas Littleton, knight, sometime one of the Justices of the Common place, in his third book of Tenures, in the chapter of confirmation, saith to his sonne."

E. B. Yordy has a few more Court Rules left. They contain the rules of the Common Pleas, Orphans' Court, Quarter Sessions Supreme Court, and Equity.

THE LUZERNE LEGAL REGISTER.

VOL. XIV. FRIDAY, DECEMBER 18, 1885.

No. 51

Orphans' Court of Luzerne County.

ESTATE OF WILLIAM WRIGHT.

An Orphans' Court sale will not be set aside if fairly made on the terms prescribed by the court, if on one offers more at a re-sale.

Exceptions to sale of real estate.

The opinion of the court was delivered June 17, 1878, by

RHONE, P. J.—We see no grounds to justify us in setting aside this sale. It was fairly made on the terms prescribed by the court, and we do not see how we can delay creditors in the collection of a debt under the evidence, for it does not establish anything very clearly. No one has offered to give more at a re-sale, and the desire of some of the creditors to wait until something may turn up is not one that we can gratify. As there seems to be some ground for a dispute about the amount due on E. Walton's judgment, we will, if the parties interested desire it, refer that question, together with the one of lien, to an auditor for disposition, and for this purpose defer a formal confirmation of the return.

Orphans' Court of Luzerne County.

ESTATE OF I. B. WEIL.

The remedy by subrogation is one of pure equity and benevolence, and there is no reason or authority for holding that time is of any consequence, provided the rights of all parties remain unchanged.

Application for subrogation.

The opinion of the court was delivered December 6, 1880, by

RHONE, P. J.—If this claim had been made on the distribution audit it would certainly have been allowed. Wallace's Appeal,

5 Barr, 105; Demmy's Appeal, 7 Wr. 159; Kelchner v. Torney, 5 Casey, 47. We think it is not too late now to prevent an injustice. The remedy by subrogation is one of pure equity and benevolence, and we know of no reason or authority for holding that time is of any consequence in these matters, provided the rights of all parties interested remain unchanged. By reference to the many cases on this subject it will be found that there is as much of a variety of time and circumstances as can well be conceived of, and yet, in all cases, the aim of the courts has been to do equity without much regard to matter of form.

The rule in this case is made absolute, at the costs of the petitioner.

Court of Common Pleas of Wyoming County.

SHIPPEY v. EVANS *et al.*

Judgment for penalty in replevin Bond—Fi. Fa. for penalty.

1. Judgment may be entered upon the warrant of attorney in a replevin bond, and execution issued without assignment of breaches or *scire facias* to ascertain the damages.
2. If execution is issued for too great a sum, relief will be afforded by the court by opening the judgment.
3. The conditions in a replevin bond are independent of each other, and failure to prosecute the replevin suit with effect works a breach of the condition in the bond.
4. It is not necessary, in order to recover upon a replevin bond, that there should be a judgment that the property be returned.

Rule to show cause why execution shall not be set aside.

The history of the case is as fully set forth in the opinion of the court as the consideration of the questions involved would seem to demand.

C. O. Dersheimer, Esq., for plaintiff.

The finding by the jury of the value of the property is not surplusage where the property has been sold. *Morris on Replevin*, p. 199.

Nor is it necessary that judgment *de retorno habendo* be entered to warrant recovery upon the replevin bond. *Morris on Replevin*, p. 260.

In claim on property bond a warrant to confess judgment is inserted and is binding upon the obligors, and, in case the pro-

thonotary is competent to assess damages, no *scire facias* or issue is necessary. *Morris on Replevin*, pp. 282-283.

It is not necessary that a return of the property should be adjudged; the bond is forfeited by not prosecuting the suit with effect. *Morris on Replevin*, pp. 255-262; *Balsley v. Hoffman & Buehler*, 1 Har. 603.

The court has power to vacate or modify judgments entered by warrant of attorney, either for cause appearing on the record, or for such as may be established by depositions. *T. and H. Practice*, Vol. I., p. 662; *Hutchinson v. Leddie*, 12 Casey, 112.

On a judgment entered upon a bond and warrant of attorney for a stated sum given as indemnity to plaintiff, execution may issue without *scire facias*, suggestion or other proceedings to ascertain damages. *McCann v. Farley*, 2 Casey, 173; *Weikee v. Long*, 5 P. F. S. 241; *Reynolds v. Lowry*, 6 Barr, 465; and *Jones v. Dilworth*, 13 P. F. S. 449.

William M. Piatt & Sons and Harding and Frear, for defendants and the rule, made no citation of authorities.

The opinion of the court was delivered April 20, 1885, by

ELWELL, P. J.—(Presiding by request of Judge Sittser). The bond upon which this judgment was entered was given to the sheriff preceding the execution of a writ of replevin in favor of R. H. Evans against Charles Shippey. It contained the usual conditions employed or required in bonds to be given by plaintiffs in actions of replevin. These conditions are independent of each other, one of them being to prosecute the suit with effect, and the other to return the property in case a return should be adjudged, etc.

It is not necessary, in order to a recovery upon such bond, that there should be a judgment that the property be returned. *Gibbs v. Bartlett*, 2 W. & S. 29. If the proceedings in the suit show that the plaintiff has not prosecuted his suit with effect, there is a breach of the condition of the bond, and, upon assignment by the sheriff in the manner required by the statute, in the presence of two witnesses, the defendant may bring suit against the plaintiff and his sureties in the bond.

When there is a warrant of attorney to confess judgment upon

the bond, judgment may be at once entered for the penalty as a cautionary measure for the purpose of security.

The questions presented by the record in this is, whether the assignee of the sheriff, the defendant in the replevin suit, can enter judgment on the bond and issue execution for the penalty without a *scire facias*, *quare execution non*, or other proceeding to ascertain the amount which he is entitled to recover for breach of the conditions.

The record in the case in which the rule is taken contains nothing in reference to the result of the replevin suit. On the hearing of the rule, however, it appears that the cause came on for trial, and a verdict was rendered as follows, viz: "And now, to-wit, November 21, 1883, jury find a general verdict for defendant, and damages for \$21.66, for detention of one horse; that is, the interest on its value, \$125." On the same day the jury fee was paid to the sheriff, but it was not filed, nor was any judgment rendered on the verdict until after the issuing of the *fi. fa.* now sought to be set aside. In fact, no judgment was entered until after the question upon the present rule had been argued by counsel. The bill of costs taxed in the replevin suit against the plaintiff, and for which both he and his surety are liable upon the bond, is \$87.44.

In the writ of replevin the value of the property is stated at \$65.

In *Gibbs v. Bartlett*, *supra*, it was held, that the value stated in the writ is *prima facie* evidence of the measure of damages, so far as regards the value of the property. Not being conclusive the parties are entitled to be heard by their witnesses on that question, unless the verdict of the jury precludes the parties from further inquiry. That question was not discussed by the counsel on the argument, and, therefore, I express no opinion in regard to it, further than to say that if the case of *Easton v. Worthington*, 5 S. & R. 130, is still the law of the state, the finding of the value by the jury was surplusage.

It does not appear in the case that it had become impossible for the plaintiff, at the time of the trial, to return the property. Nothing in the pleadings indicated that the value of the property was a matter in issue between the parties in that action. It has never been held by any court in this state that where property

replevied has been delivered to the plaintiff and the cause goes to trial on the plea of *non cepit* and property, that a verdict for the defendant may properly include a finding of the value. On the contrary, *Easton v. Worthington*, the leading case on this subject, expressly decides that a judgment for the value so found is outside of the issue, and will be reversed on error brought.

It is objected by the defendants that there had been no adjudication before issuing the execution on the replevin bond—that the property should be returned to the plaintiff here, the defendant in that suit. *Gibbs v. Bartlett*, cited above, and *Balsley v. Hoffman*, 1 *Harris*, 602, hold that this is unnecessary to entitle a recovery on the bond. It is also objected that the amount which the plaintiff here is entitled to recover, has not been adjudicated, and, therefore, the execution was prematurely issued. If this were an action on the replevin bond, the plaintiff would have been obliged to assign breaches, and upon judgment by default for the penalty, would have to ascertain the damage by writ of inquiry. But this is not the rule where judgment has been entered upon a bond by virtue of a warrant of attorney. The case of *Diller v. Wetzler*, in *Lancaster Bar*, 5, decided in 1832, which holds a different doctrine, is overruled by subsequent cases.

It now is settled by a long line of decisions that in such cases an execution may be issued for the penalty in the bond *without scire facias* or leave of court or assigning breaches. *Skidmore v. Bradford*, 4 *Barr*, 296; *Reynolds v. Lowry*, 6 *Barr*, 465; *Bank of Chester v. Ralston*, 7 *Barr*, 482; *McCann v. Farley*, 2 *Casey* 173; *Jones v. Dilsworth*, 63 *St. Rept.* 447; *Cochlin v. Com.* 11 *W. N. C.* 460.

In *McCann v. Farley* it was *held* that this rule is applicable as well to bonds of indemnity as to such as are for the payment of money. The confession of judgment being for security, the obligee is entitled to all the indemnity afforded thereby as a lien on real estate, and also to an execution to seize personalty whenever a breach occurs.

Whether the case is ripe for execution, and whether the execution is for more than the plaintiff is entitled to recover, are matters entirely within the control of the court, who can interfere

to reduce the amount if required to reach the justice of the case

In case of a dispute as to facts, the court has power to direct an issue, or direct that an amicable *scire facias* be entered, and in the meantime that proceedings on the execution be stayed. In short, the appeal to the court in such cases is a substitute for proceedings by bill in equity under the early practice of the English courts.

It is contended that the proceedings in this case on the bond do not bring before the court the record in the replevin suit. It was not necessary, for the purposes of the plaintiff, that they should so appear. The defendants confessed a judgment to secure the performance of conditions, by issuing an execution for the amount confessed. The plaintiff alleged that there had been a breach which entitled him to demand the penalty. At this stage of the case the defendants had it in their power to bring every fact upon the record which they deemed material, to show that the execution had been issued before any breach had accrued, or that it issued for more than the plaintiff was entitled to receive. Facts which would be shown by the records could be proved thereby. Facts not so appearing, but alleged to exist, could be exhibited to the court by depositions taken upon the rule to show cause, and in that way the court would be put in possession of the case. If the costs charged in the replevin suit are far too much, they could be reduced by re-taxation, and if the value of the property replevied is not conclusively fixed by the verdict, it can be ascertained in some of the modes before herein indicated.

Errors, if any, in the replevin suit, must be corrected in that, and not in this collateral proceeding. The affidavit upon which this rule was granted does not allege that the writ of replevin was prosecuted with success. The verdict shows the contrary; the judgment thereon relates back to the verdict, and is conclusive evidence that there was a breach of the bond in that respect. We decline, for these reasons, to set aside the execution.

If the penalty of the bond is more than the defendants ought, in justice, to pay, they will be entitled to relief, upon proper application, specifying minutely the grounds of complaint.

Rule discharged.

THE LUZERNE LEGAL REGISTER.

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Desiring to perfect some improvements in the LUZERNE LEGAL REGISTER for the coming year, which will make it better in many respects, we will not, as usual, complete our volume with this number. In a short time we will furnish our subscribers with a complete and perfect index to Volumes XIII. and XIV.

Orphans' Court of Luzerne County.

ESTATE OF E. V. KIDDER.

1. Where an estate consists of proceeds of sales of real estate and from coal rents, they must be accounted for separately.
2. The account of a trustee must show, 1st, his liability to the estate; 2d, the relation between the estate and each beneficiary.
3. Counsel fees will not be allowed trustees for any service performed by an attorney, except that which is strictly professional.
4. No trustee can perform his ordinary duties by such an expensive agent as an attorney at law and expect the estate to foot the bill.
5. Allowance may be made for services of counsel in procuring the appointment of trustees.
6. When trustees blend trust funds with their own, they will be treated as borrowers of the fund so far as interest is concerned.
7. A residuary fund, in the absence of any special provision to the contrary, must bear the burden of payment of debts, legacies, and general expenses of the trust.
8. Trustees will not be charged interest for funds on hand while awaiting the appointment of their successors.

Exceptions to final account of trustees.

The opinion of the court was delivered October 7, 1884, by

RHONE, P. J.—I. The testatrix died March 4, 1875, and Mrs. Moore, one of the legatees, died November 8, 1882.

II. From the account filed by Moran, executor, in 1881, as also the account and evidence now before us, we are informed that the entire estate embraced in the account consists of moneys due on lot contracts, with some interest thereon, and from coal rents. Under the terms of the testamentary trust, these two funds are to be accounted for separately, as the trustees are to invest the proceeds of the lot sales and pay out at present only the interest thereon; while they are to pay over at once the entire proceeds of the coal rents. The will does not specify from what fund the legacies and annuities shall be paid, nor from what source the expenses of the trustees shall be borne, nor does the account show from what fund they have been paid. Presumably each fund should only bear its own necessary expenses, and what these have been are left for us to find out. The account is further defective in not making a statement, 1st, between the trustees and the entire estate; and 2d, between themselves and each *cestui que trust*.

III. We shall, therefore, restate the whole account after disposing of the exceptions. The first and fourth exceptions are the only ones which relate to so much of the account as pertains to the general estate; while the rest relate to the account to be stated with each beneficiary. The first exception is, that the credits claimed for counsel fees are excessive; and the fourth is, that interest should be charged against the accountants for funds in their hands uninvested.

IV. With regard to the first we will premise that we cannot recognize the claim for counsel fees, except as a reasonable allowance to the trustees in the legitimate discharge of their duties. We consider the claim of counsel as a debt or demand against the fund only through the accountants, as being necessary for their assistance. The reason is very obvious in this case, for it is conceded that all of the business was done by the counsel, while nearly all of it should have been done by the trustees themselves, or by some clerk. No trustee can perform his ordinary duties by such an expensive agent as an attorney at law and expect the estate to foot the bill. Hence, no matter what the counsel may have legitimately charged the accountants, we can only allow a reasonable sum for necessary legal advice and the

ordinary compensation allowed accountants for their ordinary services. The exception does not specify what items are considered excessive, but in the argument it was claimed that there should be a reduction of the fee for drawing deeds, stating account, etc., and in the commissions for collections, as follows, viz:

	Charged.	Reduced to.
Drawing deeds	\$ 570 00	\$ 60 00
Real estate collections	567 91	283 96
Coal rents collected	369 05	147 62
Stating account	250 00	75 00
Procuring appointment of trustees	100 00	00 00
Expenses to New York	35 00	00 00
Total	\$1,891 96	\$566 58

Thus allowing three dollars apiece for drawing the deeds, five per cent. on real estate collections, and two per cent. on amount received from coal rents. For drawing such deeds as are exhibited, we consider three dollars as being a fair compensation. It appears from the evidence that the same attorney drew the same sort of deeds for the same lots for other parties for that sum. This is all we can allow for this item. We also think the sums named by the exceptant as commissions on collections are fair and reasonable. Such is the compensation usually allowed accountants in the absence of proof of a greater value. The sum named by exceptants, viz., \$75, is considered a very full compensation for stating such an account as this one is. It is more than is usually allowed for stating accounts, even when skillfully done. Under the evidence we deem it proper to allow the item of \$100 for procuring appointment of trustees. Some one had to prepare the papers and present them, and in this case the counsel, it seems, was solicited by the exceptant himself to find some party who would accept the trust. The item of \$35 for visiting the executor in New York for consultation, is considered a necessary and proper charge. It is allowed. The explanation by the counsel of the necessity for the consultation is satisfactory. So that, on the whole bill, we deduct \$1,190.38 from the claim of credit for counsel fees.

V. This brings us to the matter of the fourth exception. We find by the account that there was due the trustees January 1,

1878, \$355.64; and still due them January 1, 1879, \$202.36. On January 1, 1880, the balance due the estate, after deducting the former indebtedness, was \$570.93; and January 1, 1881, also a balance of \$1,031.72, and January 1, 1882, \$918.80; total of such balances, \$2,521.45. This sum, it is admitted, is still on hand uninvested. There is no proof of an attempt to invest it. On the other hand, it seems the counsel of the trustees had, up to filing the account, November 20, 1882, the money so blended with his own, that we may say he made use of it with their tacit assent. Under this state of affairs we can do no less than charge them with the interest on the same from the dates of the second annual balances as set forth until November 20, 1882. The affidavit of Mr. Dorrance filed herewith is, by agreement of counsel, submitted as a part of the depositions.

VI. On the hearing before the court for the purpose of closing all accounts and being discharged, the accountants, by their counsel, expressed a desire to be surcharged as follows :

ON SALE OF LOTS.

1873, August 25, Dresshorn	\$ 50 00
1884, January 14, Boner	71 16
Total	<u>\$121 16</u>

Also as income as follows :

1883, coal rents by C. H. Kidder	\$1,875 00
Rent of lots	7 62
1883, May 17, Holdsworth judgment	259 50
Total	<u>\$2,142 12</u>

The accountant claim credits from this surcharge as follows :

1883, Dymock legacy	\$300 00
1884, " "	600 00
	<u>\$900 00</u>

They also desire a surcharge of the sum of \$200 refunded by Mrs. Moore as an over payment to her. (See evidence taken before the court).

VII. Of what is called in the account the real estate fund, \$886 is from interest accrued on the lot contracts.

VIII. We now come to the disposition of the second and third exceptions, which relate to the separation of the funds, as before stated. The account of Moran, executor, filed in 1881, exhibits only charges from coal rents and disbursements for debts of decedent and expenses of administration, so that it does not, from our present view, at all complicate this proceeding. As we before stated, the principal of the real estate fund is to be invested, while the entire coal rents and other income are to be paid out at once. The real estate fund is made up of moneys due on land contracts executed by the decedent in her lifetime, while the coal rents are the income from a lease of coal made by the decedent. The latter is made under the will a residuary fund, and in the absence of any special provision to the contrary, must bear the burden of payment of debts, legacies, and general expenses of the trust. There is no controversy about the status of the two funds in this respect.

IX. The real estate fund accumulated as follows :

1876	\$ 100 00	1881	\$ 595 30
1877	1,372 19	1882	2,179 62
1878	228 87	1883 (ad.) . . .	50 00
1879	376 35	1884 "	71 16
1880	826 32	1884, rent . . .	7 62
	<u>\$2,903 73</u>		<u>\$2,903 70</u>
			<u>2,903 73</u>

Total real estate fund as per account . \$5,807 43

The credits allowed from this fund are as follows :

Drawing deeds	\$ 60 00
Commission on collections, 5 per cent	290 35
One-half stating account	37 50
One-half procuring trustees	50 00
Three-fourths compensation to trustees	300 00
One-half register's fees on account	10 00
Taxes paid county treasurer	15 41
Interest accrued and paid on contracts transferred to income fund	886 74
County tax	72 91
Check book	2 00
Printing deeds	40 00
Acknowledging deeds	30 00

Total credits allowed \$1,794 91

Real estate fund, Dr	\$5,807 43
Real estate fund, Cr	1,794 91
Balance due the estate	<u>\$4,012 52</u>

X. The coal rents and income accumulated as follows ;

1876-1877	\$1,508 12	1882	\$ 933 00
1878	1,225 00	1883 (C. H. K.)	625 00
1879	1,235 00	1884 " "	1,250 00
1880	1,235 00	Accrued Int. f'm R.E.Act.	886 74
1881	1,235 00	Ret. by Mrs. Moore, O. P.	200 00
		Judgment, adm	259 50
	<u>\$6,438 12</u>		<u>\$4,154 00</u>
Recapitulation, Dr			6,438 12
Total income fund as per account			<u>\$10,592 36</u>

The credits allowed from this fund are as follows :

One-fourth commission to trustees	\$ 100 00
One-half stating account	37 50
One-half procuring trustees	50 00
One-half Orphans' Court and Register's charges	10 00
Commission on collections (coal rent), 2 per ct	184 92
Visit to New York	35 00
Counsel collecting judgment	125 00
Paid Mrs. Moore	2,831 18
Paid C. H. Kidder	2,079 12
Paid Miss Dymock	2,675 00
Entry fee on judgment	1 25
Eryle judgment	100 00
Brundage on judgment	1,098 33
Check book	1 30
Entry fee, Holdsworth judgment	1 50
Entry fee	1 25
Costs	3 75
Fee in 475 April term, 1880	10 00
Stearns, engineer in mines	28 80
Amsbry " "	60 00
Reviving judgment No. 1675, April, term 1877	10 00
Total credits allowed	<u>\$9,443 90</u>
Income fund, Dr	\$10,512 36
Income fund, Cr	9,443 90
Balance due estate	<u>\$1,148 46</u>

XI. To this sum must be added the interest which we have hereinbefore determined to charge on funds on hand. (See finding No. V., *ante*). This interest account is made up as follows :

Balance due trustees January 1, 1878	\$ 355 64
Interest one year	21 33
Balance due trustees January 1, 1879	202 36
Interest one year	\$ 12 12
Total int. due trustees on over pay's	<u>\$ 33 45</u>
Balance due estate January 1, 1880	570 93
Interest to November 20, 1882 (2 y., 10 m., 19 d.)	98 61
Balance on hand January 1, 1881	1,031 72
Interest November 20, 1882 (1 y., 10 m., 19 d.)	116 59
Balance on hand January 1, 1882	918 80
Interest to November 1, 1882 (10 m., 19 d.)	48 69
Total interest charged	263 89
Interest due trustees	<u>33 45</u>
Total surcharge of interest	\$ 230 44
Which added to the prin. of income fund as found	<u>1,148 46</u>
Makes the amount now due on income fund	\$1,378 90

In this calculation we have not charged interest on the full amount found in the hands of the accountants, as per this report, for the reasons that the sum found in excess of the amount admitted as being on hand, is made up of surcharges which were fairly in dispute; besides, it was at a time when the trustees were asking to be relieved of their trust, and waiting for the appointment of a successor, with the other fact that a portion of the fund was in the hands of the exceptant as mere custodian thereof. We have found, then, in the hands of the accountants totals as follows:

On real estate funds	\$4,012 52
Less payment to their successor, Henry A. Fuller.	
as per receipt July 28, 1884	<u>4,012 52</u>
And on real estate funds	\$1,378 90
Less balance of pay't to successor July 28, 1884	<u>43 21</u>
Balance due estate to date	<u>\$1,335 69</u>

For which sum we will enter judgment, unless exceptions be filed within ten days, as provided by rules of court.

The accountants will proceed, without delay, to state a separate account with each of their *cestui que trusts*, on the basis of the foregoing report. The accountants will also pay the costs of this proceeding, as it has been their bad accounting and carelessness that has occasioned the investigation.

Court of Common Pleas of Luzerne County.

MARLIN v. MARLIN.

The court has no jurisdiction in a suit for divorce where the alleged desertion on which proceedings were based took place in another state, without a change of domicile on the part of the husband, he being the respondent.

Rule for decree in divorce.

The opinion of the court was delivered September 7, 1885, by

RICE, P. J.—The parties were married in this county in 1875. The alleged desertion took place in 1882, in Leadville, Colorado, where they then had their domicile. Shortly afterwards the complainant returned to this county, where she has since resided with her brother. It does not appear by any satisfactory proof that the defendant has changed his domicile; at any rate, he does not reside in Pennsylvania now, and has not resided here since the separation, nor has he been served with process. Upon this state of facts we conclude that the court has no jurisdiction. *Doosey v. Doosey*, 7 W. 349; *Colvin v. Reed*, 5 Sm. 375; *Reel v. Elder*, 12 Sm. 308; therefore,

The rule is discharged.

E. B. Yordy has a few more Court Rules left. They contain the rules of the Common Pleas, Orphans' Court, Quarter Sessions, Supreme Court, and Equity.

THE LUZERNE LEGAL REGISTER.

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FRIDAY, JANUARY 1, 1886.

No. 53

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Court of Common Pleas of Luzerne County.

TUFTS v. COLE.

The act of April 3, 1779, was intended to prevent interference with constables or other officers in the discharge of their duties, by replevins upon property taken in execution, and for which he is responsible. It does not apply to cases where the owner of the property, and not the officer, is the defendant in the replevin.

Rule to show cause why writ of replevin shall not be quashed.

The opinion of the court was delivered September 28, 1885, by

WOODWARD, J.—The motion to quash this writ of replevin is founded on the act of April 3, 1779, Pur. 1489, 1490, which reads as follows: "All writs of replevin granted or issued for any owner or owners of any goods or chattels, levied, seized, or taken in execution, or by distress, or otherwise by an sheriff, naval officer, lieutenant or sub-lieutenant of the city of Philadelphia or of any county, constable, collector of the public taxes, or other officer acting in their several offices under the authority of the state, are irregular, erroneous, and void; and all such writs may and shall, at any time after the service, be quashed, upon motion, by the court to which they are returnable, the said court being ascertained of the truth of the fact by affidavit or otherwise."

"The court, besides quashing the said writs, may and shall award treble costs to the defendant or defendants in such writs; and also, according to their discretion, order on attachment against any prothonotary or clerk who shall make out or grant any such writ, knowing the same to be for goods or chattels taken in execution, or seized as aforesaid."

On March 11, 1885, certain personal property, consisting of a soda fountain and fixtures appertaining to it, were levied on by a constable of Hazleton, as the property of James W. Cole, by

virtue of an execution issued by Charles Schutter, a justice of the peace. The property levied on was subsequently advertised for sale, and was left meanwhile in the store of the defendant. On March 12, 1885, a writ of replevin was issued by James W. Tufts against James W. Cole for the same property. This writ was duly executed by the sheriff, who made return that he had served the writ upon the defendant, and had replevied the property as commanded, which was delivered to the plaintiff. Subsequent to the execution and return of the replevin, the counsel for defendant obtained a rule to show cause why the writ of replevin and all proceedings under it, should not be quashed, and that is the rule now to be disposed of. We do not think that the case falls within the meaning of the act of April 3, 1779. That act was intended, in our judgment, to apply to cases where the constable, or other officer, having legal possession of property under an execution, is made the defendant in the replevin, and not to such cases as the present, where the owner, and not the officer, is sued. The purpose of the act is to prevent interference with, and annoyance to, the officer in the discharge of his duty, by replevins upon property which he has seized in execution, and for which he has made himself responsible. And this was the view adopted by the District Court of Philadelphia, in *English v. Dalbro*, 1 Miles, 160, to which we refer, although not a decision by the court of last resort. Questions of practice arising under acts of assembly, should, if possible, be settled in a uniform manner throughout the state. The character of the judges upon the bench of the District Court at the time, and the fact that no inconsistent or adverse adjudications upon the subject can be found in our books, furnish additional reasons for adopting their ruling upon the question now presented.

The rule to quash is discharged.

Thomas Rebaugh Martin was born near Hagerstown, Washington county, Md., May 26, 1849. He was educated at Mercersburg College, and Franklin and Marshall College, Lancaster, Pa., graduating from the latter institution in the class of 1874.

Mr. Martin comes from an old Maryland family. His grandfather, William Martin, was a justice of the peace in Washington county for over thirty years, and was a leading man in the community in which he resided. The father of Thomas R. Martin was David L. Martin. He was a farmer and resided in the same county. His brother, and the uncle of the subject of our sketch, Samuel Martin, was a lawyer of considerable note. Thomas R. Martin read law with D. G. Eshelman, of Lancaster, and completed his legal reading with Andrew K. Seyster, of Hagerstown. He was admitted to the bar of Washington county, Md., in the latter part of the year 1875; to the Lancaster county, Pa., bar, in January, 1876; and to the Luzerne county bar, April 10, 1876. He married, June 28, 1877, Anna A. Stirk, daughter of Isaac Stirk, of Lancaster, Pa. They have one child: Florence Virginia Martin. Mr. Martin came from Maryland to Wilkes-Barre "a stranger in a strange land," and to a bar very much overcrowded. He brought with him, however, a remarkable affability and a generally pleasing deportment and bearing that soon forged for him a way into a position of credit and prominence in his profession and in the party—the democratic—with which his sympathies lay. Professionally, nothing was too arduous to be undertaken for a client; politically, no task assigned him consumed too much of his time, or put him to too much trouble; personally, he was ready for any thing to serve a friend; and as a consequence he soon had an enviable standing at the bar, as a democrat and socially, that many less persevering and judicious, though more pretentious and ambitious, had long essayed in vain. During the time that he has been in the community he has probably made more political speeches than any other lawyer, either democratic or republican, and having a prolific vocabulary, a good enunciation, and captivating address, and being otherwise qualified for success in stump speech delivery, he at once made himself a good reputation with all who take delight in, or profit from, such instruction. The reputation thus achieved brought him into prominence for the nomination for district attorney in 1882, and in the convention of that year he polled a good vote. He was again a candidate in 1885, and reached within an ace of the nomination, his opponent, James L. Lena-

han, being especially popular, both personally and by reason of the peculiar circumstances attending the contest. Mr. Martin is a man who outlives discouragements, and if he chooses to be a candidate again, he may do so with bright promise of success.

James L. Lenahan was born in Plymouth township, Luzerne county, Pa., November 5, 1856. He attended the public schools of this city until he was fourteen years of age. He then acted as clerk in his father's store for three years, then entered the academy kept by W. R. Kingman, and completed his education at Holy Cross College, Worcester, Mass. James L. Lenahan read law with his brother, John Thomas Lenahan, and was admitted to the bar of Luzerne county January 28, 1879. In 1880 he was census enumerator for the Fourth ward of the city of Wilkes-Barre. The father of James Lenahan is Patrick Lenahan, a retired merchant of this city. His mother is Elizabeth Lenahan (*nec* Duffy), a native of Wilkes-Barre township. Her father, Bernard Duffy, was a native of County Louth, Ireland, and emigrated to this country in 1831. In November, 1885, Mr. Lenahan was the democratic candidate for district attorney of Luzerne county, and was elected, the vote standing: Lenahan, 9,191; William Henry McCartney, republican, 8,604; and Frank Caleb Sturges, prohibitionist, 470. Although the element of chance enters more or less largely into all contests for political nominations, and frequently has more to do than anything else in determining them, it must be admitted that, in the case of Mr. Lenahan's selection as the candidate of his party for district attorney in 1885, there was an irresistible tendency towards him from the moment of the announcement of his name, that was due to the esteem in which he was held by his fellows professionals and the people generally. His was one of that class of nominations that are sometimes spoken of as natural nominations. All the circumstances surrounding him and his name seemed from the outset to point to the wisdom of his being placed upon the ticket, and the fact that, though his party was at the time split up into several warring factions, all united upon and elected him, is of itself

one of the best evidences of his fitness for the position. Mr. Lenahan is a man of strong convictions and the courage to express and contend for them with all proper vigor, of good address, and of industrious disposition, and that he will acquit himself creditably as district attorney everybody feels assured.

Emmett De Vine Nichols was born in the village of Ulster, Bradford county, Pa., July 8, 1855. He is the son of George W. Nichols, of New Albany, Pa., and a descendant of Stephen Nichols, who came from England at an early day and settled in Connecticut. The mother of Emmett De V. Nichols was Elizabeth B. Nichols (*nee* Hemingway), of Rome, Pa. Mr. Nichols attended the common schools of his native township up to the age of fifteen. He then attended the select school of Professor J. B. Crawford, at Sheshequin, Pa., and at the age of twenty received a certificate to teach. He taught in Faultsburg, Pa., during the winter of 1875-1876. He attended Wyoming Seminary during a portion of the latter year, after which he went to Marathon, N. Y., for the purpose of recruiting his health. He then went to a place called Willett, near Marathon, for the purpose of teaching a select school. On the Sunday night before opening his school he delivered his first public address to a packed house in the Baptist church. After teaching several months he went to Cortland, N. Y., and studied law a day and a half in Judge Smith's office. In the spring of 1877 he came to Wilkes-Barre and entered upon the study of the law in the office of Kidder (C. P.) and Nichols (F. M.), and was admitted to the bar of Luzerne county September 16, 1879, and has been in continuous practice since. Mr. Nichols is an ardent temperance advocate, and at the age of fifteen was worthy chief templar of a Good Templar's lodge. While a student Mr. Nichols held many Murphy meetings and took an active part in good templary. He has been deputy grand worthy chief templar of the state of Pennsylvania, and is at present a district deputy. He was secretary of the first county constitutional temperance amendment association, organized in Luzerne county, and organized the prohibition party

in this county in 1880, and has been chairman of the party ever since. The same year he was one of the Pennsylvania presidential electors on the prohibition ticket. In 1883 he was temporary chairman of the state prohibition convention held at Pittsburgh. In 1884 he was the candidate of the prohibition party for congress for the Twelfth congressional district, and received 1,001 votes. In 1885 he published a work of one hundred and two pages, entitled, "The License System repugnant to sound Constitutional Law. Prohibition in perfect harmony with the spirit of American Institutions." Mr. Nichols married, June 25, 1879, Emma J. Koons, of Ashley, Pa. She is the daughter of John G. Koons, a native of the township of Sugarloaf, in this county, but who has resided in Ashley for the past twenty years. His father, Michael Koons, was a well-to-do farmer in the Conyngham Valley, and died at the age of eighty-two years. His father was a native of Schuylkill county, and removed to Sugarloaf township, and his father was born in Germany. The mother of Mrs. Nichols, and the wife of John G. Koons, is Emeline M., daughter of Captain Thomas W. Knauss. He was a native of Easton, Pa., but removed to Centreville, Pa. While residing there he was superintendent of the Reformed church Sunday school, postmaster, and justice of the peace for many years. He was captain of a military company in the Mexican war, and while in Mexico was taken with a fever and died. Captain Knauss' father, John Michael Knauss, was a native of Kreidlersville, Pa., and was a soldier in the war of 1812. His father was a native of Germany, and afterwards came to this country and here married. Mr. and Mrs. Nichols have three children: Carrie Alberta Nichols, Pearl Elizabeth Nichols, and Maud Edna Nichols.

Mr. Nichols is one of that class of men of whom examples turn up in every age and in almost every community—men whose ambition it is to figure conspicuously in movements contemplating great reformatations, and who frequently make great sacrifices, professionally and in a business way, in their ardent and unselfish efforts to achieve their object. Such men have sown the seed of every important political or social revolution the world has ever seen. They were the hard workers in the earlier days of the agitation against feudalism, for the substitu-

tion of democracies for monarchies, and for the abolition of slavery. While comparatively few of the number have lived to participate in the fruition of their hopes, their memories are always revered by their descendants, and frequently they have reached to high niches in the gallery of public fame. Whether we believe in or antagonize prohibition, we must needs concede to Mr. Nichols that he is devoted to the interests of the prohibition cause, that he is sincere in his beliefs and professions, and that he has given, and still gives, very largely in proportion to his means, to its advancement. The measure of his success, as above outlined, has been, under all the circumstances, quite remarkable. We can better appreciate such characters when we reflect upon how few there are who are content, in this world, with doing only that and all which their consciences approve. Mr. Nichols is a lawyer of good abilities, a gentleman of pleasant manners, and a reputable citizen.

Nathan Bennett was born in Wilkes-Barre, Pa., July 7, 1852. He is a descendant of Ishmael Bennett, who was born in Rhode Island about 1730. From there he removed to Connecticut, where he married, and from there came to Wilkes-Barre, where he settled about 1770. After the battle and massacre of Wyoming he returned to Connecticut with the expelled inhabitants, and subsequently returned to Wilkes-Barre, where he married for the second time (his first wife having died), Abigail Beers, widow of Philip Weeks, who was killed in the massacre. He removed to Ohio in 1816, and died there when a very old man. Nathan Bennett, son of Ishmael Bennett by his second wife, was born in Hanover township in 1788. He married Ann Hoover, daughter of Henry Hoover, a native of New Jersey, who came to Hanover in 1790 in company with his father, Felix Hoover. They were of Dutch descent. Nathan Bennett lived in this city where he died in 1872. Stewart Bennett, son of Nathan Bennett and father of Nathan Bennett the subject of this sketch, was born in Hanover township in 1830. His wife was Mary Ann Lynn, a daughter of Joseph Lynn, of Bridgeville, Warren county, N.

J., where she was born. Mr. Bennett was a prominent citizen of this city, and served in the city council for several years. He died in 1885. Nathan Bennett, the subject of our sketch, was educated in the public schools of this city and at the Normal School at Millersville, Pa. He taught one year in our schools, and for two years was a clerk in the prothonotary's office of Luzerne county. He read law with W. L. Paine and Alexander Farnham, and was admitted to the bar of Luzerne county September 22, 1879. He married, May 19, 1881, Alice, daughter of Charles Sturdevant, of this city. Mr. and Mrs. Bennett have one child: Fanny Sturdevant Bennett. Charles Sturdevant is the youngest son of the late Samuel Sturdevant, a native of Danbury, Conn., where he was born September 16, 1773. The late Ebenezer Warren Sturdevant was a brother of Charles Sturdevant, as also John Sturdevant (father of W. H. Sturdevant, Edward J. Sturdevant, and Samuel B. Sturdevant, M. D., of this city), who held the office of county commissioner of Wyoming county for several years, and who, in the year 1854, in connection with Charles J. Lathrop, represented the counties of Susquehanna, Wyoming and Sullivan in the legislature of the state. In 1838 he, in company with Chester Butler, represented Luzerne county in the same body. This was before Wyoming county was organized. It was during the latter year that the "Buckshot War," as it is called in Pennsylvania politics, occurred. The whig or anti-Masonic party, under the leadership of Thaddeus Stephens, although in a minority, undertook to organize the house of representatives by excluding the democratic members from Philadelphia, and "to treat the election as if it had not been held." Each party organized a legislature of their own. For several days all business was suspended, and the governor, alarmed for his own personal safety, ordered out the militia, and fearing this might prove insufficient, called on the United States authorities for help. The latter refused, but the militia, under Major-Generals Patterson and Alexander, came promptly in response. For two or three days during the contest the danger of a collision was imminent, but wiser councils prevailed. The whig or anti-Masonic party, seeing the danger of longer continuing the struggle, weakened, and enough deserted to the

democratic body to give that organization a decided majority, and by December 25, all had gone over to the democratic legislature save only one—Thaddeus Stevens. Against the protest of some of the democratic members, who held that Mr. Stevens was duly and regularly elected from Adams county and could not be expelled, the legislative body concluded to expel him, and did so by a vote of fifty-eight for, and thirty-four against. John Sturdevant, although a whig at that time, did not approve of the action of Thaddeus Stevens, and was one of the first to go over to the democratic body, and when the excitement was greatest and Stevens, to save his life, jumped out of one of the windows of the capitol, Mr. Sturdevant was pleased to get rid of the incubus in that manner. John Sturdevant removed from Skinner's Eddy, Wyoming county, to this city in 1857. He died here in 1879. After his removal to this county he was for many years county surveyor of Luzerne county, and also engineer of the borough of Wilkes-Barre. The mother of Mrs. Nathan Bennett is Fanny Sturdevant, a daughter of the late Isaac Hancock Ross. He was a native of Pike township, Bradford county, and was the son of Jesse Ross, who was the son of Lieutenant Perrin Ross, who lost his life in the battle and massacre of Wyoming, July 3, 1778. Jesse Ross was only five years old at the time of the battle. He married Betsey, a daughter of Isaac Hancock, January 22, 1795. He was born near West Chester, Pa. Before the revolutionary war he was at Wyalusing for a time, and returned there about 1785. He is mentioned on the records of Luzerne county as a "taverner," for Springfield township in 1788. At this time he was also one of the overseers of the poor for the district composed of the whole extent of Luzerne county, from the mouth of the Meshoppen, north to the state line. In 1790 that portion of Luzerne since constituting the area of Susquehanna county, was included within two townships—Tioga and Wyalusing. By order of the justices of Luzerne county "Tioga was bounded on the north by the northern line of the state; and east and west by the lines of that county; and on the south by an east and west line which should strike the standing stone" now in Bradford county. On September 1, 1791, Isaac Hancock was commissioned a justice of the peace for the district of Tioga by Governor

Thomas Mifflin. He "was a portly, jovial, light complexioned man, the very opposite of his grave, dignified Quaker wife, whose dark face and black tresses contrasted strikingly with the light, blonde locks of her husband." The wife of Isaac Hancock Ross, and the mother of Mrs. Charles Sturdevant, was Maria Williams, daughter of the late Latham Williams, a native of Groton, Conn., who removed with his family to Brooklyn, Susquehanna county, Pa., in 1811. Isaac Edgar Ross, M. D., of this city, is a brother of Mrs. Charles Sturdevant, and Latham Williams was the grandfather of Edward Denison Williams, D. D. S., also of this city. Mr. Bennett is another of the many who have graduated from the school room to the practice of the law. The bar has never been recruited so largely from any other source. He is a republican in politics, and has done much diligent and active service in his party's behalf, frequently acting as member and secretary of committees and performing much of that detail work of which the general public, and frequently even the candidates, know so little, but which is perfectly legitimate work, and as necessary to success as similar work is to the success of any private business enterprise. He has never been a candidate for office, but has frequently been spoken of in connection with nominations.

Edwin Shortz was born in Mauch Chunk, Pa., July 10, 1841. His grandfather, Abraham Shortz, was a native of Nazareth township, Northampton county, from which place he removed in the year 1800 to Nescopeck township, this county, having purchased from Thomas Craig on August 11, in that year, three hundred and fifteen acres of land in Nescopeck township, known as "Pine Grove Farm," for the consideration of "seven hundred pounds specie gold and silver money." He was commissioned by William Findlay, governor of this commonwealth, March 17, 1818, a justice of the peace for the townships of Sugarloaf and Nescopeck in this county, and held the office for over twenty-five years. Abraham Shortz, son of Abraham Shortz, was born in Nazareth township in 1793, and removed with his father to Nescopeck township. In 1820 he removed to Mauch Chunk, and was for

many years a contractor with the Lehigh Coal and Navigation Company, and also engaged in the manufacture of lumber. He was also a member of the house of representatives and senate from Northampton county, prior to the erection of Carbon county. By an act of assembly approved March 13, 1843, he was appointed one of the trustees "to receive written offers of donations in real estate and money towards defraying the expenses of the lands and public buildings for the use of the county of Carbon, erected out of the counties of Northampton and Monroe." After the erection of Carbon county he was for several years one of the county commissioners, and also treasurer of that county. He died in Mauch Chunk in 1876. His wife, who is still living, is Sarah, daughter of the late John Rothermel, of Nescopeck township, where Mrs. Shortz was born. Her brother, Peter P. Rothermel, is the celebrated painter, and whose handiwork is seen in the celebrated "Battle of Gettysburg," which he painted for the state of Pennsylvania for the sum of twenty-five thousand dollars. Edwin Shortz, son of Abraham Shortz, was educated in the public schools and Mauch Chunk Academy. In his youthful days he was a member of an engineer corps, and subsequently was extensively engaged in the manufacture of lumber at White Haven, on his own account and as the senior member of the firm of Shortz, Lewis, and Company. While a resident of White Haven he was elected burgess, and also a member of the school board, of that borough. In 1876 he was the democratic candidate for state senator in the Twenty-First senatorial district, but was defeated by E. C. Wadhams, republican, the vote standing: Shortz, 9,849; Wadhams, 9,936. In this connection we may state that this district, as at present constituted, has never elected a democrat but once, and Mr. Shortz reduced the majority in the district by nearly one thousand votes. Mr. Shortz read law with Stanley Woodward and was admitted to the bar of Luzerne county March 29, 1880. During the years 1882, 1883, and 1884 he was a member of the board of examiners for the admission of applicants to practice in the courts of Luzerne county. He married, November 5, 1867, Celinda Belford, a daughter of the late George Belford, of Mauch Chunk. He was a coal operator and contractor in his lifetime. Mr. and Mrs.

Shortz have a family of two children: Robert Packer Shortz and Edwin Shortz. It will be observed that Mr. Shortz came to the study of the law under circumstances differing in many particulars from those which usually surround the student. He had achieved a competence, he was nearing middle life, and his preceptor was his warm personal friend. He sought to be a lawyer, not to earn a livelihood, but from respect for, and love of, the profession, and he brought to the effort to master its intricacies and mysteries an experience in practical business life and a maturity of judgment that made success, and speedy success, a positive certainty. It was within a year or two from the date of his admission that he became a member of the examining committee, and already he had been employed as counsel in a number of important causes. At this writing his practice is an extensive and lucrative one. Although Mr. Shortz is a very excellent talker, was so before he began to study law, and employed his gift on many occasions on the stump, to the gratification of his party friends and the advancement of his party's prospects, he does not allow himself to depend in any degree thereupon in his practice. He prepares his cases with the most zealous care, and leaves little to be abetted by favorable, and less that can be successfully antagonized by, opposition oratory. He is a gentleman of refined manners, extensively read, a citizen who has the respect and esteem of all.

Jasper Byron Stark was born in Wilkes-Barre, Pa., February 17, 1858. He is a descendant of Aaron Stark, of Hartford, Conn., in 1639. He had a son William, who had a son Christopher (who removed to the Wyoming Valley in 1769), who had a son William, who settled on the Tunkhannock creek, Luzerne (now Wyoming) county, in 1795. David Stark and Aaron Stark, two of the sons of Christopher Stark, were killed in the battle and massacre of Wyoming, July 3, 1778. Nathan Stark, son of William, had a son Nathaniel Stark, who was the grandfather of the subject of our sketch. Jasper Billings Stark, son of Nathaniel Stark, was born in Tunkhannock, Luzerne (now Wyoming) county, in 1823. For many years he was a prominent citizen of

the Wyoming and Lackawanna Valleys. In his early manhood he was a merchant in the city of Carbondale, and subsequently was deputy marshal of the recorder's court of that city. In 1856 he was elected sheriff of Luzerne county, and from 1862 to 1865 he represented Luzerne county in the state senate. He was collector of internal revenue for Luzerne and Susquehanna counties under President Johnson. He was also burgess of the borough of Wilkes-Barre, and at one time chief of police. Mr. Stark was the democratic nominee for the state senate in 1859, but was defeated by Winthrop W. Ketcham, republican nominee; and again in 1874, and was defeated by Hubbard B. Payne, his republican competitor. He at different times was engaged in keeping hotels; the Eagle at Pittston, the Wyoming at Scranton, and was at the time of his death, February 16, 1882, the proprietor of the Wyoming Valley Hotel in this city. The wife of J. B. Stark is Frances, daughter of the late Captain Charles Smith. She is a native of Wurtsborough, Sullivan county, N. Y. The Smiths are of English descent, and were among the early settlers of Connecticut. Ephraim Smith, Mrs. Stark's grandfather, was born in Windham, Conn., in 1743, and died in Sullivan county, N. Y., in 1827. Charles Smith, her father, was born in Windham in 1778. He held at various periods important public offices, and served as captain during the war of 1812. He died at Carbondale, Pa., in 1865. The maternal grandfather of Mrs. Stark was Captain David Godfrey, who received his commission direct from General Washington. He was born at Cornwall on the Hudson, and was of French descent. Mrs. Stark is a sister of John B. Smith, superintendent of the Pennsylvania Coal Company, at Dunmore, Pa. Jasper Byron Stark was educated at the academy of W. S. Parsons in this city, and at the Hopkins Grammar School, New Haven, Conn. He read law with Henry M. Hoyt and the late Hendrick B. Wright, and was admitted to the bar of Luzerne county April 26, 1880. He is an unmarried man. Mr. Stark has given but little attention to the practice of the law, being without necessity for so doing. His qualifications are, however, of an order to convince all who understand and appreciate them that, if impelled by ambition to excel at the bar, or by a scantily filled purse, they would have brought him desir-

able reward. While it is true that poverty and the wants of the physical man have served to develop and amplify the talents of some of the brightest geniuses this or any other country has ever produced, it is equally a fact that the inheritance of a fortune has ultimated in losing to the world the benefits of talents equally great.

Martin Francis Burke was born in Pittston Pa., February 8, 1855. He is the son of Michael Burke, a valued and respectable citizen of this city, a native of Annadown, in the County of Galway, Ireland. He came to this country in 1840, first settling in Manayunk, Pa. In 1844 and 1845 he was employed in the rolling mill in this city. He was one of the earliest employes of the Lackawanna Iron and Coal Company, at Scranton, Pa., and was collector of tolls on the Wyoming canal at Plainsville and this city for many years. He has resided in Wilkes-Barre since 1867. His wife, whom he married in this country, is Catharine Burke (*nee* McGee), a native of Arratoma, and daughter of Martin McGee. M. F. Burke was educated in the public schools of this city and at the Wyoming Seminary, Kingston, Pa. He read law with General Edwin S. Osborne and was admitted to the Luzerne county bar May 10, 1880. He married December 23, 1879, Margaret McGinty, daughter of Manus McGinty, of this city. Mr. and Mrs. Burke have two children living: James Burke and Catharine Burke. For the past few years Mr. Burke has been engaged in other pursuits.

William Jay Hughes was born in Pittston, Pa., December 30, 1857. He is the son of the late Morris Hughes, who was born January 2, 1826, at Hollyhead, a seaport town in North Wales. Morris Hughes emigrated to America in the spring of 1845, and engaged in the tailoring trade in Pottsville, Pa. In 1850 he went to California, and while there was interested in gold mining, but subsequently branched out as a contractor and builder in Yreka, Siskiyou county, in the vicinity of the Modoc lava beds, where

General Canby was killed. He had many adventures with the Pitt River Indians, but his good sense and practical knowledge of men stood him in good stead, and he escaped all the danger that threatened him in the lava beds. Later on he engaged in farming and stock raising, and in 1856 he returned and settled in Pittston, where his brother, H. R. Hughes, had preceded him. He accepted a position as book-keeper with the firm of E. Bevan and Company, in which firm H. R. Hughes was interested. A few years later H. R. and Morris Hughes bought the brewery built by Howarth Brothers, and conducted the business under the name of H. R. and M. Hughes until the death of Morris Hughes. In 1868 the brewery was burned out, but was immediately rebuilt. Subsequently the Forest Castle Brewery was acquired by the two brothers. After he returned from California he married Jannett Shennan, daughter of William Shennan, a farmer in Clifford township, Susquehanna county. Mr. Shennan was a native of Scotland. The father of Morris Hughes was in the British navy, and was in the battle of Trafalgar under Nelson. In 1865, he re-visited his old home and attended his father's funeral, who died at the age of eighty-three years. Mr. Hughes was one of the republican candidates for the legislature when Luzerne and Lackawanna were united under the old system, but was defeated, the democratic party having a large majority in the county. He was president of the Pittston Trust Company and Savings Bank from 1870 until it passed out of existence, and was for many years a director of the First National Bank. He was also a trustee of the West Pittston Presbyterian church. Morris Hughes died July 7, 1883, at his home in West Pittston. He had many intelligent friends who valued him at his worth, and the appreciation was just. He took an active interest in all that ameliorated the condition of the indigent, and was foremost in every enterprise that promised an advantage to the general public. Mr. Hughes was pre-eminently a public man. He was constantly on the alert to serve a public need, and no one with a just cause left him empty handed. In his death a host of friends lost an intelligent friend and neighbor. Just, generous, and faithful, he was regarded as one of the foremost men of the town. During the war for the Union he was among the first to recognize the call for

aid, and he responded generously. Regarded as a public man Morris Hughes occupied an enviable position among the moneyed men of Pittston. Whatever public improvement was suggested that promised an advantage to Pittston, Mr. Hughes was free to contribute, and that generously. His main object in life seemed to be the furtherance of the public interest, while at the same time he did not neglect his duty to his household, which was among the happiest in West Pittston. As a husband and father Mr. Hughes was a model man, as a citizen he was among the first. William Jay Hughes was educated at Wyoming Seminary, Kingston, and at the Pennsylvania Military Academy, Chester, Pa. He studied law with John Richards, of Pittston, and with Alexander Farnham, of Wilkes-Barre, and was admitted to the bar of Luzerne county June 7, 1880. In 1882 he organized Company C, of the Ninth Regiment of the National Guard of Pennsylvania, and was captain of the company until June, 1885, when he was promoted to the office of major of the regiment. He is an unmarried man and a republican in politics. William Jay Hughes inherits from his father much of the acuteness, diligence, and energy as a business man by which, as we have seen, the latter was characterized. He made the best use of the years he gave to mastering the mysteries of the principles of the law, which was a necessary preliminary to his admission to practice, but with his attainment of that honor did not by any means cease to be a student. Wisely realizing that no lawyer can possibly know too much law, he still devotes all the time which his rapidly growing practice allows him, to increasing his stock of knowledge on the subject. In this connection we recall the case of a noted Pennsylvanian who recently died full of years and honors, and who in his day was without a peer at the bar at which he practiced. To assign him a case was to win it, if it had a peg of any kind to hang a favorable verdict or decision upon. His years multiplied without in the least impairing his faculties, and a remarkable memory retained all he had ever learned. But, though he continued to practice almost up to the day of his death, he was finally compelled to forego his studies, and, while never in error as to long established principles of the law, his unfamiliarity with the more recent statutory enactments

and judicial decisions became painfully apparent towards the last, and where these could be brought to bear against him he was no match for even the babes of the bar, so to speak, who, with a much more limited understanding of the law in its essence, were read up in the latest legal literature. This only goes to prove that the wisest men and greatest lawyers can never safely cease to be students. Mr. Hughes is already one of the best known and most highly respected citizens of Pittston, and is honored with much more than an average share of the legal business of its people.

Robert Davenport Evans was born in Lewisburg, Union county, Pa., August 17, 1856. He is the great-great-grandson of Joseph Evans, who, in 1785, when Lewisburg was laid out, was a resident thereof. Beyond this fact but little is known of the paternal ancestor of Mr. Evans. The probability is, that he came from Montgomery county, Pa., and was a descendant of one of the early Welsh settlers of Pennsylvania. William Evans, son of Joseph Evans, and Joseph Evans, son of William Evans, as also Thompson Graham Evans, son of Joseph Evans, were all natives of Lewisburg. The latter is the father of Robert D. Evans, and is a prominent business man in that place. The mother of the subject of our sketch, and the wife of Thompson G. Evans, is Rhoda, daughter of the late Robert Davenport, of Plymouth. He was the son of Thomas Davenport, the ancestor of the now resident family in that place, who came from Orange county, N. Y., in 1794. Hon. Hendrick B. Wright, in his "Historical Sketches of Plymouth," says the Davenports are "of Low Dutch origin." He is in error in regard to this, as the family is of English descent, and removed from New England to Orange county, N. Y., and from thence to Wyoming. The wife of Robert Davenport was Phœbe Nesbitt, daughter of James Nesbitt, jun. He was the son of James Nesbitt, sen., who emigrated from Connecticut in 1769, and was one of the Forty. He was in the Wyoming battle and massacre, and was one of the survivors of Captain Whittlesey's company. Robert D Evans was educated at the University at Lewisburg, and graduated in the class of

1875. He read law in Lewisburg with the firm of Linn (J. M.) and Dill (A. H.), and was admitted to the bar of Union county in September, 1880. He then removed to this city and was admitted to the bar of Luzerne county November 15, 1880, and has been in continuous practice here since his admission. In 1884 he was assistant secretary of the republican county committee. He is at present the attorney of the county commissioners of Luzerne county. He is an unmarried man. Mr. Evans is a man of studious habits, devoted to his profession and in a fair way of some day taking a leading position at the bar. His preceptors were men of high standing in the profession, Mr. Dill being especially well known throughout the state by reason of his long service in the house and senate at Harrisburg, and his having been a democratic candidate for governor of Pennsylvania. From these he imbibed a thorough understanding of the law and excellent business precepts, which he has since put to profitable utilization. His present position of counsel for the county commissioners is one in which careful scanning of the statutes is necessary, and knowledge of great practical value to an attorney is necessarily acquired. He has performed its duties well, to the satisfaction of the commissioners and the profit of the county.

William Robert Gibbons was born in Baltimore, Md., September 18, 1857. His father, Robert Gibbons, was a native of Westport, County of Mayo, Ireland, and emigrated to the United States in 1852 in company with his wife, Margaret, daughter of Richard Mangan, also of Westport. When but eight years of age W. R. Gibbons, with his father's family, removed to Wilkes-Barre, and has resided here ever since. He was educated in the public schools of Wilkes-Barre, and read law with John Lynch and W. S. McLean, of this city, and was admitted to the bar of Luzerne county April 4, 1881. At the age of seventeen he commenced to teach school, and taught four years in succession; three years in the public schools of this city, and one year in Hanover township, in this county. In 1882 he was elected to the council of this city for three years, of which body he was an

active and influential member. He is an unmarried man. Some of the best men in the profession have had no higher preliminary education than that which the public schools afford. A collegiate training is unquestionably advantageous, but there are scores of cases of men who have gone to the topmost rung of the ladder without it, to prove that it is not always essential. Mr. Gibbons, like many others, probably learned more as a teacher than as a scholar, for it is an undeniable fact that the charge of a public school offers an experience with, and an understanding of, human character—that of the man being, to close observers, but slightly different from that of the boy—that in an active business life is of great utility. Mr. Gibbons had a capable tutor in the law in Mr. McLean, and like him has become an expert office lawyer, who handles his cases carefully and with much deftness. In the council, as stated, he was an active and influential member, always alert in behalf of the interests of his ward in particular and of the citizens generally. He has done some valuable committee service in behalf of the democratic party, in whose tenets he is a believer. He stands well with his brother professionals and with the community at large.

John David Hayes was born in the city of Limerick, Ireland, April 4, 1853. He is the son of Thomas and Bridget Hayes, (*née* Fahy), daughter of James Fahy. They are both deceased, and never resided in this country. When sixteen years of age Mr. Hayes came to Hazleton, where he resided until 1876, and was employed in various capacities around the mines, principally as engineer and ticket boss. He was educated at St. Michael's Academy, at Limerick, and at the De La Salle College, at Toronto, Ontario, graduating from the latter institution in 1878, receiving a prize for "general excellence." After graduation he returned to Hazleton and was employed as a teacher in the public schools of Hazle township during the years 1878, 1879, and 1880. In 1881 he taught in the public schools of Freeland borough, where he now resides. He read law with Clarence W.

Kline, of Hazleton, and was admitted to the bar of Luzerne county June 11, 1881. Shortly after his admission he removed to Freeland and is the only practicing attorney in that borough. He is a notary public, and is at present one of the school directors of that place. He has been one of the auditors of the borough. Mr. Hayes married, June 27, 1882, Sally Edith Reilly, daughter of the late Peter Reilly, a native of Cavan, Ireland. The mother of Mrs. Hayes is Phœbe Smith, daughter of the late Benjamin Smith, who was a soldier in the war of 1812, and who for many years received a pension from the government. He was a native of Knowlton, Sussex county, N. J., and was the son of Josiah Smith and his wife, Sarah Kirkoff. Mr. Smith's wife was Mary Hicks, daughter of Robert Hicks, who emigrated from Ireland about 1750, and settled in New Jersey. Mr. and Mrs. Hayes have but one child living: Mary Marcella Hayes. Mr. Hayes is wholly a self-made man. Thrown upon his own resources at an early age, and compelled to earn his livelihood in positions affording him but little better compensation than that allotted a common laborer, he managed to fit himself for teaching school, and while engaged at that avocation to complete the preparations for his admission to the bar. The man who can achieve such victories over his circumstances and surroundings is necessarily made of good material, which is reasonably certain in the long run to bring him a fitting reward. He has chosen to hang out his shingle in the modest little burgh among whose people he has during the greater part of his life resided, and with whose interests he has so closely identified himself. In thus resisting the attractions of the larger towns, so potent with most newly admitted attorneys, he but gives additional evidence of the tact that has carried him successfully forward this far in his career, and that offers him a far brighter prospect of a good harvest in the end. There is generally much greater wisdom in patiently waiting to grow up with a little town than in starting in to contend against the hot and vigorous competitors of the larger ones. Mr. Hayes is a frequent pleader in the county courts. He prepares a case well and argues it with much force and ability. He is a clever gentleman, an active democrat, and a citizen of unquestionably good parts.

Court of Common Pleas of Luzerne County.

IN RE GRANAHAN.

1. When no township treasurer has been appointed or elected, it is made the duty of supervisors, either to collect the rates and levies themselves, or to appoint a collector for the purpose of making the collections.
2. Where a township treasurer exists, the law provides that the supervisors and overseers of the poor shall annually, at a meeting, etc., appoint some suitable inhabitant of the township to be collector of the township rates and levies.
3. Each supervisor may give security individually, in which case he shall not be responsible for the acts of his associate in office.

Application for a mandamus.

The opinion of the court was delivered September 21, 1885, by WOODWARD, J.—The petition in this case sets forth that Patrick Granahan has been duly elected one of the supervisors of Pittston township, has filed his bond as such, and is proceeding to fulfill the duties of the office. It further states that James Keating is the other supervisor, and refuses to join the petitioner in the appointment of a tax collector, but threatens to collect the taxes himself. The petitioner prays us to grant a rule to show cause why a mandamus should not be issued, directed to the said James Keating, commanding him to join in a meeting for the purpose of appointing some suitable inhabitant of the township to be collector of township rates and levies, etc. When no township treasurer has been appointed or elected, it is made the duty of supervisors, either to collect the rates and levies themselves, or to appoint a collector for the purpose of making the collections. (See act April 15, 1834, Pur. 1594, pl. 82-83). Where, as in the present case, a township treasurer exists, the law provides that the supervisors and overseers of the poor shall annually, at a meeting, etc., appoint some suitable inhabitant of the township to be collector of the township rates and levies. Act of April 15, 1834, §31, Pur. 1593, pl. 74. There is nothing in the petition before us to show that the supervisors, even if convened for the purpose, would have any lawful authority to appoint a collector of taxes in the manner proposed. We also call attention to the fact that the act of March 16, 1860, Pur. 1640, pl. 20, provides, that each supervisor may give security individually, in which case he shall not be responsible for the acts of his associate in office.

We can see no sufficient reason for granting a mandamus, and the motion is therefore denied.

BOOK NOTICE.

FEDERAL DECISIONS. Cases argued and determined in the Supreme, Circuit, and District Courts of the United States. Arranged by William G. Myer. Vol. VIII., pp. 900. The Gilbert Book Company. St. Louis, 1885.

The eighth volume of this important work is now presented to the profession and public. Contracts and the laws regulating them being the basis of human society, a work of this character can scarcely be overestimated. The vast number of decisions upon this subject, in all its ramifications, make an orderly compilation of cases with reference to the several divisions of the theme, a laborious and difficult task, and we congratulate the editor on its successful accomplishment. An analysis of this subject, so comprehensive, under a limited number of heads, makes the work eminently practical. The volume is divided into 2,012 sections. Sections 1 to 165 cover the general law of contracts: what constitutes a contract, parties, etc. The following sections, 166 to 330, treat of the several kinds of contracts: by letter, by telegraph, etc. Sections 331 to 438 compose the third division, wherein the subject of consideration is discussed. The validity of contracts make the fourth division, sections 439 to 769. This part of the work has numerous sub-titles, *e. g.*: in general; contrary to statute; to public policy; duress and undue influence; mental incapacity, etc. Division fifth embraces sections 770 to 1,326. Here the rules of construction and interpretation are set forth. Performance and breach are covered by sections 1,327 to 1,677. Division seventh treats of alteration of contracts, sections 1,678 to 1,716. Division eighth, sections 1,717 to 1,854, the statute of frauds. Division ninth, sections 1,855 to 1,885, rights of action. The last and tenth division, sections 1,886 to 2,012, takes in the measure of damages liquidated and penalties. The accurate and faithful presentation of the law upon so vital a subject, as declared by our highest courts, in so convenient form, is a work worthy of the editor.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, JANUARY 8, 1886.

No. 54

Court of Common Pleas of Luzerne County.

PETERS v. SUSQUEHANNA FIRE INSURANCE COMPANY.

Certiorari.

Where there has been personal service of summons, a variance as to the name of the plaintiff between the summons and the transcript of the docket entries does not constitute one of those jurisdictional defects which will avail to overturn the judgment after the time for suing out the writ of *certiorari* has expired.

The opinion of the court was delivered September 7, 1885, by

RICE, P. J.—This record shows a personal service of summons on May 1, 1882, followed by judgment on May 5, 1882, the defendant below being in default. On February 2, 1885, an execution was issued, and on February 5, this writ of *certiorari* was sued out. The chief exception is based on the variance between the summons and the docket entries. In the former the name of the plaintiff below is given as "The Susquehanna Mutual Fire Ins. Company," while in the transcript of the docket entries it is given as the "Susquehanna Mutual Fire Ins. Co., of Harrisburg, Pa." The exception correctly states the variance, but we cannot agree with the counsel that it constitutes one of those jurisdictional defects which will avail to overturn the judgment, after the time for suing out a writ of *certiorari* has expired, against the express provision of section 21 of the act of March 20, 1810. It is of the nature of a variance between writ and declaration, and upon the principle which controls in such cases it must be taken advantage of at the earliest opportunity. (See *Dillman v. Schultz*, 5 S. & R. 35; *Porter v. Cresson*, 10 S. & R. 257; *Overseers, etc., v. Bunn*, 12 S. & R. 291; *Hockley v. Fulmer*, 4 Y. 130; also

Shenk v. Mingle, 13 S. & R. 31; *Seitz & Co. v. Buffum*, 2 H. 69). The second exception, based on the variance between the judgment and execution, is well taken, and, so far as that writ is concerned, the *certiorari* was sued out in time. The exception is therefore sustained.

The exception to the execution is sustained, and the same is set aside at the costs of the defendant in error; the exceptions to the judgment and previous proceedings are overruled, and the *certiorari*, so far as it applies to them, is quashed.

G. L. Halsey, for plaintiff in error.

George H. Butler, for defendant in error.

Supreme Court of Pennsylvania.

COMMONWEALTH v. THOMPSON.

Jurisdiction of borough burgess.

Under the general borough law of April 3, 1851, a burgess of a borough has no jurisdiction as an inferior court to adjudge civil causes. He is not the official to hear and determine suits for fines and penalties imposed for violations of the borough ordinances.

Error to the Common Pleas of Warren county.

A police officer of the borough of Clarendon arrested Thompson and took him before the burgess of the borough, charged with the violation of a borough ordinance against the storing of nitro-glycerine within the borough limits. At the hearing Thompson pleaded guilty, and was fined \$100 and costs, whereupon he sued out a writ of *certiorari*. The court reversed the proceedings of the burgess, holding that he had no jurisdiction in the premises, and further suggested the recovery should have been by civil action.

The opinion of the court was delivered October 5, 1885, by

TRUNKEY, J.—It is admitted that the principal question is, whether the burgess of a borough has jurisdiction to impose

finer for offenses arising from violation of borough ordinances under the general borough law of April 3, 1851, P. L. 320." If he has not, there is no occasion to consider the validity of the ordinance, nor whether the remedy for recovery of the penalty may be by a summary proceeding. Section 32 of said act provides, that "fines and penalties under the ordinances of the borough shall be recoverable before any justice of the peace of the borough." This should be noted in reading the act to ascertain the legislative intent. The magistrate is named, and the act does not clothe the burgess with the general jurisdiction of such magistrate, nor does it expressly authorize proceedings before him for the recovery of fines and penalties. Not contending that the burgess has the civil jurisdiction of a justice of the peace, the plaintiff urges that he is vested with the criminal jurisdiction, and therefore this proceeding was begun before the proper officer. In support of the claim reference is made to the third paragraph of section 5 of the act. The burgess shall have power "to exercise the powers, jurisdiction, and authority of justices of the peace within the borough, for the suppression of riots, tumults, disorderly meetings; and in all criminal cases, for the punishment of vagrants and disorderly persons, he shall be entitled to the same fees for like services." This is quoted as printed in the pamphlet laws; it is differently punctuated in Purdon's Digest, and its punctuation in the plaintiff's printed argument differs from both. But its sense ought not to be changed by the shifting or injecting of commas and semicolons. As printed in the laws published by authority of the commonwealth, the burgess has the executive power of a justice of the peace for the suppression of riots, tumults, and disorderly meetings, and the judicial power of that officer for the punishment of vagrants and disorderly persons. If the whole sentence be read "without breaks and stops," it has the same meaning. It is always to be presumed that the legislature will express its intention in clear and explicit terms. This has been done by the clause giving the burgess the jurisdiction of a justice of the peace in five cases by name. Had it been intended to give such jurisdiction in all criminal cases none would have been so designated. Nothing in the entire statute calls for disjoining the clause by stops, and

forcing a construction that it vests the burgess with the power of a justice of the peace in all criminal cases.

The statute makes the burgess the chief conservator of the public peace, and to the end that he may maintain order and peace in the borough, he is empowered to act as a justice of the peace to suppress disorder and to punish vagrants and disorderly persons. This accords with the twenty-first paragraph of the second section, which authorizes the proper corporate officers, or justices of the peace within the borough, to commit persons to the lock-up house for temporary detention, not exceeding the period of forty-eight hours at one time. It is the duty of the burgess to enforce the ordinances, hear complaints, remove nuisances, exact faithful performance of duties by appointed officers, and exercise jurisdiction in all disputes between the corporation and individuals arising under the ordinances and regulations. These duties are executive. However extensive the authority intrusted to him, taking into view the entire statute, it is plain that the burgess has no jurisdiction as an inferior court to adjudge civil causes. The corporate officer who is to take care that the by-laws and ordinances shall be faithfully executed and enforced, is not made the judge to hear and determine suits for fines and penalties imposed for violations of the ordinances.

At the argument reference was made to the case of *Reid v. Wood*, 102 Pa. St. 312, where the proceeding was to recover a fine for violation of an ordinance of the borough of West Chester. The judgment was reversed because the record did not show that the defendant had done any thing prohibited by law or ordinance. But the decision has no tendency to support the proposition, that under the borough law of 1851, suits for fines and penalties may be brought before the burgess, or that a summary proceeding before any magistrate is authorized. The act of June 18, 1842, P. L. 291, §11, gave the burgess of the borough of West Chester jurisdiction of all suits for recovery of fines and penalties imposed by any ordinance of the borough. Had the question been raised, or a doubt suggested by counsel, possibly an additional reason would have been expressed for reversing the summary conviction.

Judgment affirmed.

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FRIDAY, JANUARY 15, 1886.

No. 55

Court of Quarter Sessions of Crawford County.

IN RE CORONER'S INQUESTS.

1. It is the duty of coroners to hold inquest, *super visum corporis*, only where there are suspicious circumstances surrounding the death, indicating that it was caused feloniously or in a violent or unnatural manner. Where death results from natural causes as by a stroke of lightning, a fit of epilepsy, apoplexy, or a fall induced by drunkenness, there should be no inquest.
2. The coroner is the judge of the necessity for an inquest, and it will be presumed that he acted in good faith, and his costs will be allowed until the contrary is shown.
3. Coroners' jurors are entitled to one dollar per day where the time employed does not exceed six hours, and one dollar and fifty cents per day where it exceeds that amount; and the time should appear by the return of the inquest. They are entitled to no mileage or traveling expenses.
4. A constable is not entitled to fees from the county for summoning a coroner's jury. The coroner must summon his own jury or pay for it himself.
5. Witnesses before a coroner's jury are entitled to no fees or traveling expenses.
6. The county is liable for the services of a physician, called in by the coroner to make a *post mortem* examination, but not for the services of two physicians.
7. Where a justice of the peace holds an inquest, it should appear by the return that he had jurisdiction by reason of absence or inability of the coroner, or that his office was more than ten miles distant from where the death occurred.
8. The testimony taken before the coroner should not be returned with the inquest.

Sur return of inquests, *super visum corporis*, submitted for approval and certificate of probable cause.

The opinion of the court was delivered October 12, 1885, by

CHURCH, P. J.—There are several matters in the court pending my action, and which makes it necessary and advisable that I call the attention, not only of the coroner of the county, but of all justices of the peace throughout the county, and, indeed, of the public generally, to the law on the subject of coroners and justices of the peace, when holding inquests, *super visum corporis*.

The coroner is a very ancient officer, and originally acted only in the nature of a committing magistrate. Much of his authority in England he derived from the common law; and the acts of parliament, which afterwards defined more particularly his authority, became a part of the law of this commonwealth. It is the duty of the coroner to hold inquests, *super visum corporis*, where he has cause to suspect that the deceased was feloniously destroyed, or where his death was caused by violence, or where he has any ground to suspect that the death of any person was an unnatural one, or an unaccountable one, or a suspicious one. When the cause of death is not doubtful, the coroner ought not to put the county to the expense of holding an inquest. It is true that the presumption is that the coroner acts in good faith and with sufficient cause in holding the inquest, but that presumption may be overthrown by evidence, and when the coroner, holding an inquest, seeks to compel the payment of his fees by the county, the county may always show, if it can, that the coroner acted not in good faith and without sufficient cause or reason. It is the coroner himself who is to exercise his discretion, and he is held accountable for the proper exercise of this discretion, as I have before said. He is the only judge of the necessity of the inquest; he is the one to determine whether any suspicion exists as to the cause of death; and not the neighbors or relatives of deceased. The coroner should not hold an inquest because an individual requests it, but for the primary investigation of the circumstances of the case. So long as there are no circumstances hanging around the finding of the dead body, or the death of the individual, the coroner need not act; neither should he act, nor any one else act for him. We have an act of assembly which provides that, in all cases where, by law, the coroner of any county is required to hold an inquest over a dead body, it shall be lawful for a justice of the peace of the proper county to hold the same, where there is no lawfully appointed coroner, or he is absent from the county, unable to attend, or his office is held more than ten miles distant from the place where the death occurred or the body is found, and said justice shall have the power to select, summon, and compel the attendance of, witnesses and jurors, receive like fees, tax like costs, and the inquest shall have like

force and effect in law. It will be seen that the jurisdiction of the justice of the peace in this sort of matter is purely statutory; that is to say, he has no right to hold an inquest outside of the power given him by statute. It follows, therefore, that his jurisdiction to hold an inquest must appear on the face of his return of the inquest; that is to say, it must appear that there was no lawfully appointed coroner in the county, or that he was absent from the county, or unable to attend the inquest; or that his office is more than ten miles distant from the place where the death occurred, or the body found.

I have before me five several returns of inquests *super visum corporis*, held by justices of the peace in different parts of the county, which have been submitted to me for certificate of probable cause for holding the same, and for approval thereof. In no one of these cases does this statutory jurisdiction appear, and hence I have no information upon the subject of the authority of the several justices of the peace to hold these inquests. In two of the cases before me the inquests find that the deceased was struck by lightning; one finds that the deceased died in an apoplectic fit; and another that the deceased died in an epileptic fit; and the fifth one finds that the deceased fell down stairs in a drunken fit. One would suppose that when death occurred in a fit of epilepsy, or by a stroke of apoplexy, or by a stroke of lightning or a fall induced by drunkenness, that such death was not caused by the commission of any felony, or by undue means, or in any unnatural manner, or in a suspicious or doubtful manner. These deaths, or at least four of them, certainly occurred through a visitation of God, and this could be as well known to the public and to the neighbors of the deceased as though he or she had died in his or her bed. There can be no excuse for a coroner, or justice of the peace in his absence, holding inquests under such circumstances as I have narrated. I do not think that justices of the peace have the same right to exercise the coroner's judicial functions as the coroner himself has. The act of assembly only provides that the justices shall hold inquests where the coroner is required by law to hold an inquest over a dead body. This law, requirements, and discretion I have cited above. If a family or any person should desire a coroner, or

justice of the peace acting as such, to hold an inquest *super visum corporis*, they should be willing to pay for it, and not impose the costs and expenses thereof upon the county, under the circumstances I have above narrated and as they appear in the several inquests. In one of them, indeed, the costs were paid by the husband of the deceased, and no claim is made therefor upon the county. These inquests will all have to be returned to the several justices who held them, in order that it may appear upon the face of the proceedings that the coroner was absent, or unable to attend, or that his office was held more than ten miles distant from the place where the death occurred. The justices seem to have acted in good faith, and I do not like to say upon the face of the proceedings that there was not reasonable cause for holding the inquest, but I have deemed it my duty to call the attention of the coroner and justices of the peace to this state of facts, so that they may know their rights, duties, and responsibilities in these various matters, and that there may be a stop put to this unnecessary holding of coroner's inquests upon every imaginable occasion.

If the coroner, in holding an inquest, is informed by the jury that they cannot come to the conclusion without the services of a physician, and it appears to the coroner to be necessary, he may call in the services of a physician to make a *post mortem* examination; and for this the county must pay a reasonable fee. This is a somewhat dangerous power, to be sure, to be put into the hands of coroners and justices of the peace, but power must be lodged somewhere. It is given to them, and certainly we hope that they will exercise it with a great degree of caution. In some of the cases submitted to me I notice itemized bills of costs. Many of these items are utterly illegal and without any warrant of law. Coroners' juries are not entitled to any fees at common law; and, by express statute only a few years old, they are entitled in this commonwealth to receive the sum of one dollar per day where the time employed does not exceed six hours, and one dollar and fifty cents per day where the time exceeds six hours; and they are entitled to receive no mileage whatever. And yet I find, in some of the inquests, jurors' fees charged at two dollars per day without it appearing at all whether they were

ten hours or ten minutes in the discharge of their duties. Fees for witnesses are also charged in these bills. I know of no law or authority authorizing the taxation of witness fees before coroners' juries. It is the duty of such portion of the public as know anything pertinent to be heard before a coroner's inquest, to appear without fee or reward. In one of the inquisitions the constable has charged fees for summoning the jury. The coroner himself should summon and qualify his jurors, and draw and return his inquest. He receives pay for the same. The coroner himself should do this, and not call in the aid of any one else, unless he expects to pay him out of his own pocket. I notice another charge made for livery hire in conducting jurors and witnesses to view the body. As I have said before, jurors are entitled to no mileage, neither are they entitled to any payment for expenses in the discharge of their duties, except that allowed by the fee bill. While I have stated that the coroner may call in a physician to hold a *post mortem* examination under certain circumstances, I do not think he has a right to call in two physicians, and yet I find in one inquest the fees of two physicians charged for holding a *post mortem* examination. What I have said above as to coroners, applies, of course, with equal, if not greater, force to justices of the peace acting as such under the statute in holding inquests *super visum corporis*. I have noticed in these inquests before me, and, indeed, in many others that have been submitted to me heretofore, that the justices of the peace, acting as coroner, return the testimony with their inquisition, as if they were returning depositions taken for court. This should not be done. The inquest should not report the evidence, but should only return the effect thereof and the result that the inquest arrived at therefrom.

Owing, as I believe, to the unnecessary frequency of these inquests, and the consequent burden imposed upon the county in the payment of unnecessary costs, I deem it my duty to call the attention of the coroner and the various justices of the peace throughout the county to this matter, and the clerk of courts will see that the proper information of the principles laid down in this opinion is given to the coroner and the various justices of the peace.

BOOK NOTICE.

HUSBAND AND WIFE IN PENNSYLVANIA, by Tatlow Jackson, pp. 134. Rees Welsh & Company. Philadelphia, 1885.

This is a short compendium of the law of husband and wife in Pennsylvania. Though brief, it is exhaustive of the subject. It is evidently intended for the table of a lawyer, and it will save many a step to the book case for authorities that lie open before you in the book. It is divided into three sections: 1. How marriages may be contracted; marriage regarded as a civil contract; requisites to make marriages valid, etc. 2. Of the dissolution or suspension of the marriage relation: by the death of either husband or wife; by divorce, etc. 3. Legal effect and consequences of marriage; what the husband acquires by marriage; what the husband parts with by marriage; effects by common law of marriage on the entity of the wife; acts of assembly ameliorating the condition of married women; equitable separate estate of a married woman; legal separate estate of a married woman; acknowledgment acts; results to married women of acts ameliorating their condition. It also contains a table of cases cited; table of statute laws: 1. British statutes; 2. Acts of assembly. It is a valuable work and worth purchasing.

On the trial of Horne Tooke, having objected to a particular piece of evidence, he was reminded by Chief Justice Eyre, that, if there were two or three links in the chain, they must go to one first, and then to another, and see whether they amounted to evidence. The defendant demurred to this.

HORNE TOOKE.—I beg your pardon, my Lord, but is not a chain composed of links, and may I not disjoin each link, and do not I thereby destroy the chain?

EYRE, C. J.—I rather think not, till the links are put together, and form the chain.

HORNE TOOKE.—I rather think I may, because it is my business to prevent the forming of that chain!

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FRIDAY, JANUARY 22, 1886.

No. 56

Supreme Court of Pennsylvania.

WRIGHT v. COMMONWEALTH.

Corporation—Election of new board of directors—Old board holding over—Filling vacancies in board.

1. An election was held for seven directors of an electric light company, chartered under the act of 1871, five only received a plurality of votes cast, three others voted for received a tie vote. Held, the failure to elect the entire board did not affect the election of the five who received a plurality of votes; they constituted a quorum and their election was valid.
2. The old board, under the circumstances, would not hold over. Had the stockholders not adjourned, but proceeded to ballot again, the result would have been legal, or they might have adjourned the election to a subsequent day.
3. Whether the stockholders could cumulate again to fill the vacancies, not decided.

For opinion of the court below see 14 Luzerne Legal Register, 37; 3 Kulp, 231.

Error to the Common Pleas of Luzerne county.

PAXSON, J.—This record presents the single question whether, where an election is held for seven directors of a private corporation created under the act of 1874, at which the cumulative plan of voting is employed, and five only, composing a legal quorum, of the candidates receive a plurality of votes, is such election valid as to the five so chosen? It is not denied that the election was regularly and legally held on the day appointed by the charter; nor that the votes were properly counted. When, however, the result was made known, the stockholders' meeting had been adjourned, and it was found that, in consequence of a tie vote for three of the candidates, five only had received a plurality. There was no attempt to complete the number by a second ballot, as the stockholders, not anticipating such a result had left for their homes, nor was a subsequent special meeting called for that purpose. The five directors receiving a majority proceeded to organize the new board, and the vacancies have not been filled in any manner. The old board claim to hold over upon the ground that the board must be elected as an entirety,

and that the election of a portion only of the number is a nullity. The election was for seven directors. That they are called a board has no significance. There were seven places to be filled; when the polls closed, the five persons who received a plurality of all the votes cast were either elected or they were not. Did the failure to elect the other two directors at the annual meeting render the election invalid as to the five? If so, we have a principle which is wholly at variance with our entire theory of elections, public and private, political, municipal and corporate. No doubt exists that if the stockholders had not adjourned, and had proceeded to another ballot, the result would have been legal. Nor is there more room to doubt that had they adjourned the election to a subsequent day, an election for two more directors on that day would have been valid. It is said, however, that inasmuch as there was no second ballot and no adjournment, and the act of 1874 does not provide for filling up the board under such circumstances, the two vacancies cannot be filled at all; and that the five directors who were elected cannot act, and the old board holds over. This conclusion is reached by confusing two distinct questions—the validity of the election of the five directors, and the filling the vacancies caused by the failure to elect the remaining two. The first question is legitimately before us and must be decided; the second is not. The five directors having received a majority of votes were elected; their right to their seats does not depend upon the failure of the corporation to fill the vacancies any more than it would had the vacancies occurred from any other cause. The power of a board is never suspended by vacancies unless the number be reduced below a quorum. Here a quorum were elected; their power to act is not impaired by the neglect of the corporation to fill up the board. It is begging the question to say that the act of 1874 does not provide for such a contingency. If the mode of doing so had been prescribed by the act or by the charter of the corporation, the mode thus designated must be followed. (See *Gowen's Appeal*, 10 W. N. C. 85). But where the act is silent, and there is no prohibition, the power inheres in the corporation to hold an election. It is a necessity of its corporate existence, and is among the implied powers granted. This is familiar law. *Dill Corp.*, Vol. 2, pl. 768; *Ang. & A. Corp.*, par. 124; *People v. Runkle*, 9 Johns.

157. But the mere power to fill vacancies, or the manner by which it shall be done, has no relation to the power of the other directors, or the validity of their election. *Non constat* that such vacancy will be filled at all. A stockholder may, perhaps, by appropriate proceedings, compel the corporation to proceed to fill vacancies in the board of direction, but no one has ever supposed that a neglect to fill up the board would prevent the directors from acting as a board so long as there was a quorum. I have not been able to find a single authority which sustains the position of the plaintiffs in error, while the cases of *The Union Insurance Company*, 22 Wend. 591; *People v. Jones*, 17 *Id.* 81; *The Excelsior Insurance Company*, 38 Barb. 297, are entirely in accord with the views I have expressed.

The question of the effect of cumulative voting is entirely outside this controversy. When the votes under such a system are cast and counted, the validity of the election must be determined precisely as in all other cases. Whether the stockholders can cumulate again to fill the vacancies is a matter that must be determined when the case arises. We cannot settle it in advance, and therefore will express no opinion. The complications suggested in the argument of the learned counsel for the plaintiffs may not, and probably will not, ever arise. If they should, we will endeavor to grapple with them when they are brought before us.

Judgment affirmed.

Court of Common Pleas of Luzerne County.

VANDERMARK v. BOROUGH OF NANTICOKE.

Where a party desiring to take an appeal from the judgment of a magistrate, calls at his office for that purpose, it is the duty of the officer to give all the necessary information as to the requirements and proper method of so doing. If he fails to do this the court will allow an appeal *nunc pro tunc*.

Rule for an appeal nunc pro tunc.

The opinion of the court was delivered September 21, 1885, by

WOODWARD, J.—It would seem clear from the depositions filed in this case, that Jones, the secretary of the Town Council, went to the office of the alderman for the purpose of taking the appeal

within the twenty days. His statement is as follows: "Esquire Ziegler seemed to be in very much of a hurry. I presented the papers and told him I wanted an appeal in the case of Vandermark v. The Borough. After he examined the papers he made an entry in his docket, after which I asked him if that was all that was necessary. Ziegler replied that that was all that was necessary—that all was right. * * * I left the office thinking everything was right." This evidence is corroborated by that of James Fisher, a member of the Town Council, who accompanied Jones for the purpose of seeing that an appeal was taken. The deposition of Alderman Ziegler does not contradict this testimony, although it denies any intention to mislead the borough officers as to the method of taking and entering the appeal. The transcript remained in the alderman's office for some six months uncalled for. Without imputing to the magistrate any bad motive, or any willful omission of a duty, we are of the opinion that he should have done something more than he did in this case. A great many good business men are profoundly ignorant of the processes and forms of the law. When such people think they have been wronged by the judgment of a justice of the peace, and, within the time allowed by the statute, call at his office for the purpose *bona fide* of taking an appeal, they are entitled to have from the justice all the necessary information and instruction as to the method of so doing. If this were not the true view of the matter, the offices of our magistrates would become mere traps for the unwary, rather than places where justice is judicially administered. The discharge of the duties of a public office involves something more than a mere perfunctory compliance with the letter of the law. To hold otherwise would be to put a premium on low cunning, and official jugglery.

In the present case it is not to be doubted that the borough authorities intended to enter an appeal, and were ready and willing to take all the steps necessary to obtain it. Under such circumstances, we hold that it was the duty of the alderman to give the officers of the borough, who asked for the appeal, all necessary instructions. This he failed to do, and we therefore make the rule absolute.

Harry Hakes, for plaintiff.

W. H. Hines, for defendant.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, JANUARY 29, 1886.

No. 57

Court of Quarter Sessions of Luzerne County.

COMMONWEALTH v. MCCLURE.

Libel—Privileged communications—Malice or Negligence—Proof—Section 7, Article I., constitution of 1874, Bill of Rights.

1. In a prosecution for libel, where the alleged libellous matter is a privileged communication, malice or negligence must be proved affirmatively, beyond a reasonable doubt, by extrinsic evidence, and cannot be inferred from the language alone of the matter published.
2. Discussion in a newspaper of the character of a private citizen who advocates a candidate for federal appointment by circulating petition and by solicitation and other personal influence, is a privileged communication under Section 7, Article I., of the constitution of 1874.

Trial under indictment for libel.

The charge to the jury was delivered December 10, 1885, by

WOODWARD, J.—A. K. McClure is indicted for the offense of libel, J. C. Coon being the prosecutor. At the outset it will be proper to define the nature of libel. Our statute defines it as follows: "If any person shall write, print or publish or exhibit any malicious or defamatory libel tending either to blacken the memory of the dead or the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule, such person shall be guilty of a misdemeanor." Further light is thrown on the nature of the offense by reference to other definitions. Judge story says: "Any publication, the tendency of which is to degrade or injure another person, to bring him into contempt, ridicule, or hatred, which accuses him of a crime punishable by law, or of an act odious and and disgraceful to society, is a libel." Chief Justice Tilghman says: "Any written or printed slander which tends to expose a man to contempt, ridicule, hatred, or degradation of character, is a libel." In its most general and comprehensive statement, then, any malicious pub-

lication, injurious to the reputation of another, is a libel. The publishing of slanderous and libelous matter, calculated to defame and injure the reputation, is presumed, in the law, to have intended that which is the natural result of the publication, and hence is presumed to have been actuated by malice, until the contrary is shown. Malice, in common parlance, implies hate, anger, or a desire for revenge, but in a legal point of view, may consist of gross, willful, and reckless misconduct toward another, evincing a wicked intention to do him an injury.

Certain things in the present case are not denied. Mr. McClure, the defendant, is the editor of the *Philadelphia Times*, a daily newspaper published in the city of Philadelphia, and was such on May 21, 1885, when the alleged libel was published. It is not denied that this paper has a large circulation in the city of Philadelphia, in the city of Wilkes-Barre, and throughout the country. The publication complained of was as follows, under the heading, "On the Hunt for Office. A Luzerne Delegation who want to deal out the patronage. Special Dispatch to the *Times*."

"Washington, May 20th.—J. C. Coon and a small politician known as Billy Hines, of Wilkes-Barre, came down to Washington last night to deal out the Luzerne county offices. Coon is the man who was prosecuted and convicted of conspiracy and perjury, and served a term of imprisonment in the Luzerne county jail. The pair are accompanied by a couple of other men and are backing a man named McCarty for postmaster at Ashley. They also want one Coleman to be postmaster at Wilkes-Barre. Coleman is one of the editors of a paper called the *Sunday News-Dealer*. The man who is backed by the reputable citizens of Wilkes-Barre is J. K. Bogert. The latter is a leading Democrat of Luzerne county, &c."

The contents of that article, if not true, amount to a libel, unless there is something else in the case to be considered, which serves to modify and alter its effect. It is not claimed that the charges stated are literally true; there was a mistake of fact in reference to the offenses charged against Mr. Coon in the article. It is claimed, however, by the defense, that certain publications in newspapers are privileged, under the 7th section of the Bill

of Rights, and that this is such a publication, without regard to the truth or accuracy of its contents.

Section 7, Article I., of the Declaration of Rights, reads as follows: "The printing press shall be free to every person who may undertake to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. No convictions shall be had in any prosecutions for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for publication or information where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and, in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."

It is clear that a new element has thus been introduced into the law of libel in Pennsylvania. The law of libel has been a changeable and progressive one. A new era has been reached in our law of libel in the adoption of the constitution of 1874. It is claimed by the defendant that the publication in question was a privileged one and is protected by the constitution. This brings us properly to the question, "Was the subject matter of the article complained of proper for public investigation and information, and, therefore, a privileged publication?" If it was a privileged publication, then the malice or negligence necessary to constitute libel must be affirmatively proven.

The article concerned the question of the appointment of a postmaster for the city of Wilkes-Barre, for which a sharp contest was pending. Perhaps nothing excites a small community more than the appointment of its postmaster. The position is an important one; people feel an interest in the appointment, and exert themselves for one applicant or another. Candidates are frequently numerous; each of whom has friends to urge his claims upon the appointing power, in various ways—by personal interviews, by petition, by letters, and by other influences. One of

the methods adopted in urging the claims of the candidate is to show who are his supporters and who sustain his rivals. It is legitimate and common to urge that the indorsers and approvers of one are better and more representative citizens of the community in which they live than the supporters of another candidate. It is claimed by the defendant that, under the evidence in the present case, Mr. Coon, the prosecutor, was an active friend and supporter of Mr. Coleman, an applicant for the Wilkes-Barre postoffice, that he circulated petitions in his behalf, solicited support for him, was anxious for his success, and went to Washington with parties who were supporting Mr. Coleman. The proper freedom of the press would be ignored and disregarded if it should be held libelous to discuss such a question as this in the newspapers. Newspapers are great facts in the midst of our civilization, and the public look to them for instruction and information. Such instruction and information is privileged, under the constitution. To that extent the publication in question is a privileged one and is shielded by the Bill of Rights. But a shield should not become an ambush. The press should be protected in all fair methods of attack, but its warfare must be honorable and its weapons unpoisoned. Having great privileges, the press has also great responsibilities. The papers may discuss the characters of people who are fairly the objects of criticism, but they must do so without malice or negligence, not recklessly or hastily or in disregard of facts and truth.

A second question in the case is, Did the defendant act maliciously, from a desire for revenge or from settled anger against the prosecutor, or without just cause, wrongfully, willfully, or recklessly? This is a question of fact for the jury, and for them alone, to be decided under the obligations of their oaths from the evidence in the case. It is not my custom, nor is it my purpose in the present case, to go over the testimony of the witnesses in detail; it has been discussed thoroughly and with great ability before you by the respective counsel. The question of fact for the jury to ascertain is, was this publication, under the evidence, malicious? Or, if it was not malicious, was it made negligently? The best definition of negligence I now remember, is this: "Negligence is want of care according to the circumstances."

The defendant has testified before you as to the nature of a great newspaper organization, stating that the paper with which he is connected has correspondents at various points, who are selected with a view to their ability, integrity, capacity, and fitness for the place; that they are instructed to furnish news to the newspaper, but to do so carefully, judiciously, honestly. It has been shown in the case further, that the correspondent of the *Philadelphia Times* at Washington, who sent the dispatch which is now complained of as a libel, was a careful, experienced, and prudent newspaper man. His duty was to keep the public informed of public transactions at Washington and political events as they occurred—a proper duty, in view of the relations of the press to the people. Knowing there was a contest for the Wilkes-Barre postmastership, and finding parties in Washington from Wilkes-Barre, and having learned that their mission had some relation to the postoffice, he then had an interview with a former resident of Wilkes-Barre. It so happened that his informer had been a prosecutor of Mr. Coon in criminal proceedings instituted in Luzerne county. Of this fact Mr. Murray [the correspondent of the *Times*] was informed, and, concluding that such information had a public value, he communicated it to his newspaper in Philadelphia. Was this “care according to the circumstances?” All information must be obtained in some way. Did this correspondent employ a reasonable method of getting the information on this subject? Was it communicated in good faith to his paper? Was it published for a good purpose and with a good intention? Having said to you that, under the circumstances, such a publication as this is privileged, under our constitution, it becomes of vital importance for the jury to decide whether it was malicious or whether it was negligent, and this may be ascertained by them from the testimony in the case.

It must be admitted that this case is a peculiar one, and presents a question which, in some of its aspects, is unlike any other which has arisen since the adoption of the constitution of 1874. The prosecutor is a private citizen; he was not a public officer nor an applicant or candidate for office, at the time of the alleged libel. He was not a contractor with the government; he was not, in any of the usual senses of the word, a public official or a

public man. He was simply, so far as regards the case before us, a supporter, an advocate for the selection of a candidate who desired an appointment at the hands of the general government as postmaster of the city of Wilkes-Barre. As such supporter he obtained signatures, as is alleged, to a petition in favor of the appointment, solicited support, and visited Washington to lend his influence in promoting the success of his friend and business partner. Whether his action in the premises brings him within the meaning of the 7th section of the Bill of Rights, is an inquiry which finds no direct response in any of the adjudicated cases, and one in the disposition of which we are to be guided by the analogies rather than the mandates of the law. In our opinion, gentlemen, the case is covered by the 7th section of the Bill of Rights. It then remains for the jury to ascertain from the evidence whether the publication was maliciously or negligently made. If you find the defendant published this article maliciously, or if you find he was guilty of negligence in its publication, he should be convicted. If you find, on the other hand, there was no malice in the publication and no negligence, then, though the charge, in point of fact, was false or incorrect, the defendant should be acquitted. Whatever else we have to say to you can be said in connection with the points submitted.

The defendant respectfully asks the court to charge the jury as follows :

I. The object and efforts of J. C. Coon to influence the appointing power of the government of the United States, rendered his conduct and character a matter of legitimate information for the public, if communicated through the press. Any information which it was proper to have communicated to the president and postmaster general, touching the fitness of the characters of the recommenders and supporters of an applicant for an appointment, was proper to be given to the public ; such information was a privileged communication.

This point we affirm.

II. In case of a privileged communication, malice or negligence must be affirmatively proved : they cannot be inferred from the language alone of the matter published, without extrinsic evidence.

This point we affirm.

III. The commonwealth have proved neither malice nor negligence. On the contrary, both are distinctly and explicitly disproved by the evidence given in behalf of the defendant, if the jury believe the evidence.

This point we decline to affirm. It involves a question of fact which is for the jury exclusively.

IV. The publication made by the defendant was a privileged communication, and there can be no conviction, whether true or false, in the absence of malice or negligence, both of which must be affirmatively proved.

This point we affirm, as we have already substantially done in our general charge.

V. The defendant cannot be convicted as charged in the indictment unless the jury find that the commonwealth has proved beyond a reasonable doubt that the publication set forth in the indictment was either maliciously or negligently made.

This point we affirm. The doctrine of reasonable doubt is as applicable to a case of libel as to any other criminal charge.

VI. The malice essential to be thus established must arise from hatred or ill will toward the prosecutor and a desire to do him injury.

This we cannot affirm. Libel may, in a legal sense, consist of much less than is stated in the point. It may consist of the abuse of a person without just cause, wrongfully and recklessly, as we have heretofore explained.

This case, gentlemen, like all others, must be disposed of without prejudice or partiality; your conclusion must be based solely on the law and the evidence. If you say the defendant is guilty in manner and form as he stands indicted, you have nothing to say about the costs. If you find him not guilty, you may impose them upon either the prosecutor, the county, or the defendant; or you may divide them between the prosecutor and the defendant in such proportion as you may deem just. With these remarks we leave the case in your hands.

Verdict, not guilty, defendant to pay costs.

John McGahren, for commonwealth.

Henry M. Hoyt, Henry W. Palmer, and Garrick M. Harding, for defendant.

Court of Common Pleas of Luzerne County.

STOREY v. MCGLYNN.

Certiorari—Justice of the peace.

It is not essential to state the hour, where the record shows that the parties appeared on the return day and went to trial, and that judgment was rendered publicly.

The opinion of the court was delivered November 16, 1885, by

RICE, P. J.—It was not essential to state the hour at which the case was heard and the judgment was rendered, inasmuch as the record shows that the parties appeared on the return day of the summons and went to trial, and that the judgment was rendered publicly. Our first impression was that the exception to the jurisdiction was well taken, but upon the authority of *Miller v. Savage*, 2 Luz. Leg. Reg. 191, we conclude that it must be overruled.

The judgment is affirmed.

W. H. Hines, for plaintiff.

Court of Common Pleas of Luzerne County.

IN RE PETITION OF MICHAEL RUDDY.

Specific performance of a decedent's contract is exclusively within the jurisdiction of the Orphans' Court.

The opinion of the court was delivered October 19, 1885, by

RICE, P. J.—It may be questioned whether the contract was not executed by the decedent in his lifetime by the execution and acknowledgment of the deed which Esquire Cox says he delivered to the petitioner. But, however this may be, it is to be observed that the prayer of the petition is for *specific performance* of a decedent's contract. This remedy is one exclusively within the jurisdiction of the Orphans' Court.

Therefore the petition and proceedings are dismissed.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, FEBRUARY 5, 1886.

No. 58

Court of Common Pleas of Luzerne County.

PERREGO *et al.* v. NICHOLS, *et ux.*

Certiorari—Practice.

1. It is not to be presumed that the justice acted fraudulently or corruptly from the mere excessiveness of the damages awarded.
2. The fact that the record was not sent up on or before the return day of the writ does not warrant a dismissal of the *certiorari*.
3. Where a plaintiff in error takes no steps within ten days after the return day of the writ to compel a return of the record, the defendant in error is entitled to a dismissal of the writ as of course. But a motion to dismiss the writ because of non-compliance with the above rule of court comes too late after the proceedings have been returned.
4. The original writ must be delivered to the justice. Service by copy is irregular and defective and he cannot be attached for disregarding it.
5. But where service, although irregular and defective, has been made within five days after the writ issued, and, notwithstanding the irregularity, the justice sends up his proceedings, and makes return to the original before motion to dismiss, the court will review the proceedings as if the writ had been regularly served.
6. Where the justice renders judgment by default, the hour as well as the day should be stated on the record.

The opinion of the court was delivered November 10, 1885, by

RICE, P. J.—The record shows that this was an action of trespass for injuries done to personal property. The alderman entered judgment by default against the defendants below for \$300. For the purpose, as alleged, of showing that this was a fraudulent judgment, the plaintiffs in error have taken depositions to prove that the cause of action was the sale of two cows claimed by Mrs. Nichols upon an execution against Thomas Nichols, her husband, and that the value of the cows was not over \$40. On the part of the defendants in error there is evidence that they were worth \$65 or \$70. In any view of the case the difference between the value of the cows and the amount of the judgment is very great, and if the evidence before the alderman was the

same as that presented to us, it is difficult to understand how such a judgment could have been rendered. But fraud is not to be presumed from the mere excessiveness of damages awarded. The remedy of the party aggrieved is by appeal. Further, there is no proof, and it is not to be presumed, that the evidence before the magistrate was the same as that submitted to us. On the contrary, the legal presumption is, that he had evidence before him which, in his judgment, authorized him to award the damages he did. Acting upon this presumption we dismiss the parol evidence as to the damages from consideration.

The counsel for the defendant in error moves to set aside the *Certiorari* for the reason that it was not served in time. This motion raises a question of some importance. The facts are these: Judgment was rendered on February 9, 1885. The *certiorari* was issued on February 25, 1885. By the sworn return of J. F. Chollett, constable, it appears that on the following day he served the writ on the alderman by reading and leaving a true and attested copy with him. The original writ with the foregoing return was filed on February 27. The following entry appears upon the transcript: "February 26, 1885, received from J. F. Chollett, constable, an alleged *certiorari*, having no court seal, which the justice refuses to recognize. March 27, 1885, received from the Court of Common Pleas *certiorari*." On March 30 the alderman endorsed the usual return upon the original writ, and in obedience thereto filed his proceedings. The return day of the writ was March 2. The present motion was made on April 4. Section 21 of the act of March 20, 1810, provides: "That no judgment shall be set aside in pursuance of a writ of *certiorari*, unless the same is issued within twenty days after judgment was rendered, and served within five days thereafter." Section 3, Rule IX., of our Rules of Court provides a method for compelling returns to such writs in case of default by the justice, and concludes as follows: "It shall be the duty of the plaintiff in error to cause the record to be returned, and if he neglects, for ten days after the return day, to take the proper steps to compel a return, the *certiorari* shall be dismissed, as of course, by the prothonotary."

We will briefly state our conclusions upon the questions of

practice arising under the rule of court, the act of assembly, and the facts above stated, without encumbering this opinion with an extended discussion of the various points presented by the counsel for the defendants in error in his ingenious argument.

I. The fact that the record was not sent up on or before the return day of the writ does not warrant a dismissal of the *certiorari*. *Gaeley v. Baird*, 4 Y. 418.

II. Where a plaintiff in error takes no steps within ten days after the return day of the writ to compel a return of the record, the defendant in error is entitled to a dismissal of the writ as of course. But a motion to dismiss the writ for non-compliance with the above rule of court comes too late after the proceedings have been returned.

III. The writ of *certiorari* is directed to the justice. The command is that "the plea aforesaid, with all things touching the same, * * * * you certify and send, *together with this writ*." Regularly, therefore, the original must be delivered to him. 1 T. & H. 894. Service by copy is clearly irregular and defective, and the justice could not be attached for disregarding it. But where service, although irregular and defective, has been made within five days after the writ issued, and notwithstanding the irregularity, the justice sends up his proceedings, and makes return to the original before motion to dismiss, the court will review his proceedings as if the writ had been regularly served. (See 2 Bac. Abr. 178; *Daniel v. Phillips*, 4 T. R. 499; *Com. v. McAllister*, 1 W. 308). If there had been no attempt to serve the writ within five days, and the proceedings were not sent up on the return day, an entirely different question would be presented.

The record shows that on the return day of the summons the plaintiffs appeared, that the defendants were in default, and that after hearing, etc., the judgment was rendered. Judgment having been rendered by default, the authorities hold that the hour as well as the day should be stated on the record. *Lindsay v. Sweeny*, 6 Phila. 309; *Smith v. Featherston*, 10 Ph. 306; *Culver v. Behee*, 2 Kulp, 266; *Keeley v. Wentzel*, *Id.* 360.

The judgment is reversed.

W. S. McLean, for plaintiff in error.

H. R. Linderman, *contra*.

Supreme Court of Pennsylvania.

IN RE GATES.

Attorneys—Abstraction of records—Embracery—Criminal law—Disbarring or suspension of attorney.

A Court of Common Pleas has authority, without a trial by jury, to suspend from practice an attorney guilty of the offense of abstracting a part of the records of the court in the interest of his client, although this is by statute a criminal offense.

For opinion of the court below see 14 Luz. Leg. Reg. 373: 3 Kulp, 422.

Error to the Common Pleas of Luzerne county.

The opinion of the court was delivered January 18, 1886.

PER CURIAM.—Public policy demands that the court and the public be protected against unworthy practices of an attorney in his profession. The learned judge after a full hearing, and on evidence the most of which was undisputed, found the plaintiff in error guilty of abstracting from the files in the office of the prothonotary, a receipt attached to a *feri facias*. While there may have been doubt as to any criminal intent, yet it was clearly an act of such professional misconduct as to justify the judgment of the court in suspending him from practice for the limited time specified. The reasons stated in the opinion of the court sustain its conclusion.

Judgment affirmed.

Orphans' Court of Sullivan County.

ESTATE OF JOHN GROVES.

Widow's Exemption—Evidence.

1. In order to secure the benefits accruing under the acts of April 26, 1850, and April 14, 1851, allowing \$300 exemption to the widow of a decedent, the claimant must reside within the limits of this state.
2. To secure the beneficial operation of these acts claimants must make their demands within a reasonable time. After the full expenses of administration have been incurred, it is too late.
3. The widow of a decedent is a competent witness to prove cruel and barbarous treatment by her husband.

The opinion of the court was delivered January 12, 1885, by

SITTSER, P. J.—John Groves died in February, 1882. He left a will by which he devised all his property, real and personal, to

his daughter, Mary Groves, and made Edward Bergen his executor. On May 22, 1882, letters testamentary were issued to Edward Bergen, and on June 12 the executor filed an affidavit setting forth that the decedent left no personal property. On November 8, 1883, on petition of the executor, an order of sale was granted by the court, authorizing the executor to sell real estate for the payment of debts. This sale produced a fund sufficient to pay the debts and leave a balance in the hands of the executor of \$468.79 for distribution among the heirs. This fund was claimed by Mary Groves, devisee under the will, and \$300 of it by Mrs. Catharine D. Groves, widow of John Groves, deceased, who claimed it as the widow's exemption. The claim of the widow was resisted by the devisee; 1st, because the widow left the home of the deceased in 1865 and had not cohabited with him since, and was not at the time of his death a member of his family; 2d, because the claim was not made until September 12, 1884, a period of two years and seven months after the death of John Groves, and until after the expenses of a full administration had been incurred. It was claimed on the part of the widow that in 1865 she was driven from home by the misconduct of the husband; by his cruel and barbarous treatment; that she was forced to leave him, and that she took with her all, or nearly all, of the children. To prove this the deposition of the widow and of her son, Jeremiah, was taken in Colorado on commission, and it appears by this testimony that the widow left her husband in 1865, taking with her the children; that she resided for some years in the state of Pennsylvania, and that about 1877 she moved to Colorado, where she has since resided. Other testimony on the subject of her treatment by her husband was taken upon both sides. Mary Groves, the devisee under the will, was also called as a witness, to show that her father's treatment of his wife and family was kind and considerate. Objection was made to the competency of the widow by Mary, and to the competency of Mary by the widow. The auditor held that they were both competent. We sustain his ruling in this respect for the reason given by him, viz., that the parties claim by devolution on the death of John Groves, and that *interest*, therefore, will not disqualify. Hunt's Appeal, 4 Out. 590. The auditor

has also found that the widow was justified in leaving her husband by reason of his conduct towards her. The evidence was conflicting. The auditor did not regard the matter as free from difficulty, but we think he was justified by the testimony in reaching the conclusion he did, and we cannot reverse his finding.

As to the second objection that there was no appraisement and no demand made for it in time, it is clear that a delay of two years and a half, when the expenses of a full administration have in the meantime been incurred, would be sufficient to prevent her from claiming the \$300 on this distribution, unless there be sufficient excuse for the delay. (See Hunt's Appeal, 100 St. 590, and cases cited in the opinion of the auditor in that case). In Terry's Appeal, 55 St. 344, the widow was permitted to take \$300 out of a fund for distribution, although her claim for it was not made until eighteen months after the death of her husband, and it appeared affirmatively in the case that she promptly took steps to secure the exemption as soon as she learned of her husband's death. In this case it does not appear when the widow first learned of the death of her husband, John Groves. In answer to the eighth interrogatory the widow says, speaking from the date of September 12, 1885, "About one year ago, on learning the full particulars of my husband's decease and of his estate, I made application to the executor," etc. This language implies a prior knowledge of his death and that she waited to learn "full particulars" of his death and estate. When she first learned of his death is not stated. Where there is long delay we think the burden is on the widow to excuse it by showing that she moved promptly on learning of the death. Here the expenses of a full administration had been incurred. The real estate had been sold for the payment of debts, and all that remained to be done was the distribution of the balance left after the payment of the debts. We think this demand made on September 12, 1884, was not in time. It was also objected on the part of Mary Groves that the claim of the widow to \$300 of this fund should not be allowed because the widow was not at the time of the death of John Groves a resident of the state of Pennsylvania, but was a resident of the state of Colorado. In Rhone's O. C. Practice, Vol. I., p. 294, ¶ 10, it is said that "The widow must reside in this state to

entitle her to the exemption, even against the children," and Platt's Appeal, 30 Smith, 502, is cited as authority for the position. We find the same statement of the law in the syllabus of that case, but the opinion does not seem so decisive. In Spier's Appeal, 2 Casey, 233, a wife living in a foreign country, who had never formed a part of her husband's family here, was held not entitled. If we look to the construction of the law allowing \$300 to debtors, we find that a non-resident defendant is not entitled to the benefit of the exemption laws. *Snow v. Dill*, 6 W. N. C. 330; *Collum's Appeal*, 12 W. N. C. 309; *McWilliams v. Newlin*, 12 Lan. Bar, 68; s. c. 1 Chester Co. R. 50. These cases were decided upon the law as it stood prior to the act of May 8, 1874, P. L. 124, and have a bearing upon this question. In *McCarthy's Appeal*, 18 Sm. 217, Justice Woodward says, "We do not legislate for men beyond our jurisdiction, for the act of 1849 was designed for our own citizens, for the families of the poor who are with us." In *Collin's Appeal*, 12 W. N. C. 309, it is said in the opinion that it is contrary to our system of exemption laws to extend their benefits to non-residents. The case before us is an example of the wisdom of these decisions. The fund for distribution is \$458.35. The auditor appropriates to costs, etc., \$61, leaving a balance of \$397.35. \$300 of this sum is awarded to the widow in Colorado, and \$97.35 to Mary Groves, the daughter, in Pennsylvania. The widow's exemption is founded upon motives of humanity. It is designed to give temporary relief to those who have been deprived, by death, of one to whom they have looked for support, until they have time to seek other means of subsistence. As was said in *Sipe v. Maun*, 3 Wr. 414, and in *Hettrick v. Hettrick*, 5 Sm., 293, the act was intended for the maintenance and support of the decedent's family, so that one bereavement should not be followed by another, the loss of subsistence. This thought is repeated many times in the decisions. In this case Mary Groves was a member of her father's family for six years prior to his death. She took care of him in his last sickness. She was the one who felt the loss occasioned by his death, and who was deprived of a home by means of it. It would be a strange application of a law passed from motives of humanity and charity "for the poor who are with us" to take

this fund from Mary, the sole legatee in the will, and transport nearly all of it to the widow in Colorado, the daily routine of whose life was not disturbed by this death.

We distribute to Mary Groves \$264.90. We direct the further sum of \$132.45 to be paid to her, upon her giving bond, with two sufficient sureties, to be approved by the court, to pay to Mrs. Catharine D. Groves, the widow of John Groves, deceased, the interest upon 132.45 annually during the life of said Catharine D. Groves. The first payment of interest to be made on January 1, 1887. In other respects the auditor's report is confirmed.

Court of Common Pleas of Montgomery County.

IN RE ROAD IN WHITEMARSH *et al.*

The employment of one of the viewers as surveyor of the road, and payment for his services as such by the petitioners, is fatal to the proceedings.

The opinion of the court was delivered May 23, 1883, by

BOYER, P. J.—The report of the viewers must in this case be set aside upon the fifth exception. Alan W. Corson was at the same time the paid employé of the petitioners, as surveyor to lay out the road, and one of the jury of viewers. No suspicion of any intentional wrong or unfairness is imputed; but, upon the broad ground of public policy, a road viewer should not occupy this dual relation in such a proceeding. This survey was made nominally by another, but Mr. Corson was the responsible surveyor and received the pay for the service, as appears from the depositions. It would be inconsistent not to set aside the report for this cause, since the court has repeatedly held that to pay for the dinner of a viewer, or treat him to refreshments, by one of the parties, was a good reason for avoiding the report. The principle at the foundation of these rulings is, that no pecuniary interest or benefit should be allowed to exist, which by possibility might, even unconsciously, incline the viewers to favor the liberal side, or, at least, excite a suspicion on the other side that the action of the jury was not impartial.

Report of viewers set aside.

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Court of Common Pleas of Luzerne County.

IN RE HUNT.

The written notice given by persons claiming the benefit of the lien conferred by act of April 9, 1872, and supplement of June 13, 1883, must contain every element which, under said acts, is essential to establish his right of preference, although the form of the notice is immaterial. Hence, it must show, not only that the labor was done in a business defined in the act, *but also that the property subject to the lien is embraced in the levy.* Allison v. Johnson, 11 Norris, 314 followed.

Exceptions to auditor's report.

The opinion of the court was delivered November 30, 1885, by

RICE, P. J.—Assuming that the exceptant belongs to the classes of persons who are entitled to a lien for their labor under the act of April 9, 1872, P. L. 47, and the supplement of June 13, 1883, P. L. 116, still, his lien was not a general one upon all the property of the defendant, but attached only to "the mine, manufactory, business, or other property in and about, or used in carrying on said business, or in connection therewith," about which the claimant was employed. It has repeatedly been held, that the written notice of claim should contain every element which goes to make up a valid claim under the act; it cannot be supplemented by parol evidence, and it is not enough if it is simply sufficient to put other interested parties upon inquiry. Hence it is essential that it show, not only that the labor was done in a business defined in the act, but also that *the property subject to the lien is embraced in the levy.* Allison v. Johnson, 11 Nor. 314. This may be done by stating that the property was "in and about or used in carrying on said business, or in connection therewith," or by the use of equivalent terms. As the counsel for the exceptant truly says, the form of the notice is immaterial if it contains the essentials of a valid claim under the

act. Reasonable certainty is all that is required. The law, then, confers the lien, and it is not required that the claimant shall state the legal effect of the matters set forth in his notice. But without the foregoing essential it cannot be said that the notice, on its face, shows that the claimant had any lien upon the property seized. For aught that appears, the property under levy may have had no connection whatever with the business in and about which he was employed. We agree, therefore, with the auditor that, under the authorities cited in his report, the notice was defective.

The exceptions are overruled and the report is confirmed.

E. A. Lynch, for plaintiff.

B. F. McAtee, for exceptants.

Court of Common Pleas of Luzerne County.

KLEEMAN v. KEMMERER et ux.

Equity—Right of passage—Injunction.

Plaintiff was the lessee of a suite of rooms on the third floor, and defendant was the lessee of a suite of rooms on the second floor, of a certain building. There was a single front door, hall, and stairway common to both suites of rooms. Defendant claimed and exercised the right to keep said front door locked, thus compelling the plaintiff and members of his family to unlock it when they wished to enter or admit visitors. Plaintiff prayed for an injunction—*Held*, that the parties had a common right of way as to front door, hall, and stairs, which, however, each was bound to exercise *reasonably*; that keeping said door locked at all hours was undoubtedly a serious inconvenience and injury to the plaintiff, and, therefore, an injunction should be granted to restrain the defendant from keeping said door locked, except at night, between the hours of 8:30 P. M. and 6:30 A. M.

In Equity. Motion to continue preliminary injunction.

The opinion of the court was delivered October 31, 1885, by

RICE, P. J.—The plaintiff is the lessee of a suite of rooms on the third floor, and the defendant, James Kemmerer, is the lessee of a suite of rooms on the second floor, of a building in the city of Wilkes-Barre. There is a single front door, hall, and stairway leading to the second floor. Have the defendants a legal right to keep the front door leading from the street into the hallway locked, so as to compel the plaintiff and members of his house-

hold to unlock it when they wish to enter, and also to descend the two flights of stairs for the same purpose, in order to admit visitors? This is the question for decision in the present case. For, if they have no such right, there can be no doubt as to there being a remedy by injunction. Appeal of Hacke & Hugus, 5 Out. 245. Neither party shows us what is the custom, if there be any, in the city of Wilkes-Barre as to tenements so occupied. Neither, aside from their lease, do the defendants show us any contract, either with the plaintiff or their common lessor, as the foundation of the right which they claim to exercise. Without proof of such contract or custom, the rights of the parties must be determined by a construction of the written leases under which they hold. Both are in the form commonly used for house leases. It is to be observed that all that is, in either case, embraced in the express terms of the demise is the suite of rooms. Without more there would be implied a right of passage to and from the street. But, in order to prevent misunderstanding, there is in each lease a clause "reserving to the parties on third floor the privilege of front and back stairs, each party to take turns in keeping said stairs clean." Our construction of the rights of the parties under these leases is, that as to the front door, hall, and first flight of stairs they stand upon an equality, and have a common right of way. Each is bound, in the enjoyment of his premises, to exercise that right reasonably. Neither has a right to infringe upon the equal right of the other by placing any unreasonable or unnecessary obstruction in the way of his use of the door, hall, and stairs leading to his tenement. The fact that the front door was supplied with separate signal bells communicating with each suite of rooms, and that each tenant was furnished with keys to the locks, would seem to indicate that, at certain times at least, the said door was intended to be locked, and that the parties so understood when the leases were entered into. But they would not understand, nor would it necessarily be inferred from these facts alone, that the door was to be kept locked at all hours both of the day and night, unless such was the local custom, or it was clearly necessary in order to secure the defendants in the reasonable enjoyment of their tenement.

It has been held that a grant, in general terms, of a private

right of way over one's land does not necessarily imply a negation of the owner's right to erect gates across it. The facilities for passage are to be regulated by the nature of the case and the circumstances of time and place. *Connery v. Brooks*, 23 Sm. 80; *Maxwell v. McAtee*, 9 B. Mon. 20; *Bateman v. Talbot*, 31 N. Y. 365; *Bean v. Coleman*, 44 N. H. 539; *Baker v. Frick*, 45 Md. 337. If, therefore, the plaintiff had simply a right of passage through the rooms of the defendant, or if the latter could be protected in the enjoyment of his premises in no other way, the locking of the front door might not be considered an unreasonable obstruction, or, in view of the circumstances stated, contrary to the original understanding and intention of the parties. But the case supposed is not the case presented for our decision. Here, as we have shown, the plaintiff does not hold subject to any superior right of the defendants, but in all respects upon an equality with them. It further seems to us that, during the day time, the defendants will be sufficiently secured from unreasonable intrusion and disturbance by closing or locking the doors which lead from their rooms to the common hallway. Keeping the front door locked at all hours is undoubtedly a serious inconvenience and injury to the plaintiff, and if this can be avoided, and the defendants at the same time be protected in the enjoyment of their premises, there can be no question as to our duty. These ends, we think, can be reached in the way indicated, and by a modification of the injunction so as to permit the door to be locked at night.

The preliminary injunction heretofore awarded is modified so as to permit the defendants to keep the door opening from the street locked between the hours of half-past eight in the evening and half-past six in the morning; and, except as above modified, the same is continued until further orders.

W. S. McLean, for plaintiff.

G. L. Halsey, *contra*.

E. B. Yordy has a few more Court Rules left. They contain the rules of the Common Pleas, Orphans' Court, Quarter Sessions, Supreme Court, and Equity.

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FRIDAY, FEBRUARY 19, 1886.

No. 60

Court of Common Pleas of Luzerne County.

RABE v. BARBER.

A judgment note given by a married woman, although she has been declared a *feme sole* trader, is null and void, and will not justify an execution against her property.

Rule to stay execution.

The opinion of the court was delivered September 27, 1885, by
WOODWARD, J.—By an order of court dated December 17, 1874, Mrs. M. D. Barber was declared a *feme sole* trader. Since that time she has carried on the business of buying and selling drugs, medicines, and other merchandise in the borough of Pittston, in this county. On March 27, 1885, she executed and delivered to the plaintiff her promissory note for \$330.13, with warrant of attorney to confess judgment. Judgment having been entered on the note and execution issued thereon, the present rule to stay proceedings was applied for, on the ground that a married woman, although a *feme sole* trader, cannot confess judgment even for a debt contracted in carrying on her business as such, so as to bind her separate estate. The precise question thus presented does not seem to have ever been passed upon by our Supreme Court, in any reported case. It was held in *Burke v. Winkle*, 2 S. & R. 189, that in a suit against a *feme sole* trader upon a specialty her husband need not be joined; and in *Borard v. Kettering*, 12 W. N. C. 345, that a married woman who has received the benefits of the act of April 3, 1872, with regard to her separate earnings, and subsequently engages in business under the sanction of the act, is liable upon a contract entered into by her in the prosecution of said business, and may be sued as though she were a *feme sole* without the joinder of her hus-

band. But neither these and other similar decisions, nor the acts of assembly of February 22, 1718, and May 4, 1855, recognize the right of a married woman, although a *feme sole* trader, to confess a judgment. She may sue and be sued, plead and be impleaded at law, without joinder of her husband, and her separate estate may be taken in execution to pay her debts, but no statute or adjudication has, thus far, established her right to confess judgment. It has been held in England that a confession of judgment by a *feme sole* trader is void. *Candel v. Shaw*, 4 Term R. 362. And the same doctrine has been recently announced by Allison, P. J., in the Common Pleas of Philadelphia, in *Mayer v. Haurwitz*, 16 W. N. C. 176. For the foregoing reasons we feel bound to hold that the confession of judgment by Mrs. Barber in the case before us was null and void, and the execution, so far as regards her, of no effect.

The rule is made absolute.

W. L. Reader, for plaintiff.

W. H. Hines, for defendants.

Court of Common Pleas of Luzerne County.

ROTHKOFSKI v. HADDOCK.

It is the duty of the court to grant a new trial where the verdict is clearly against the weight of the testimony.

Rule for new trial.

The opinion of the court was delivered September 7, 1885, by

RICE, P. J.—If the plaintiff's testimony had been unexplained and its effect unqualified by other testimony in the cause, it is possible that the jury would have been justified in finding in his favor upon the basis of an implied contract. But the uncontradicted evidence introduced by the defense was that McCormich, at whose instance the plaintiff went to work in the defendant's mine, was not the latter's agent, nor was he a miner; he was a contractor driving an outlet at so much per yard, and bound by his contract to furnish materials and employ his own men. As

such contractor he employed the plaintiff to work for him, and, therefore, any inference of an implied contract by the defendant to pay the plaintiff was rebutted and McCormich was alone liable to him for his wages. This is not the case of an irreconcilable conflict of evidence, but a case where the testimony introduced by the defense is entirely reconcilable with that given by the plaintiff, but at the same time so qualifies and supplements it as to exclude the inference of an implied contract with the defendant, upon which theory the plaintiff recovered. Conceding that it was our duty to submit the question to the jury, it is none the less our duty to grant a new trial where the verdict is so clearly against the weight of the testimony.

The rule is made absolute and new trial granted.

W. H. McCartney, for plaintiff.

G. L. Halsey, for defendant.

Court of Common Pleas of Luzerne County.

SEYBERT v. OWENS.

1. The court will not strike off judgment entered on the transcript of a justice of the peace for matters not appearing on the face of the transcript.
2. Judgment was entered on a transcript, which the defendant moved to strike off upon the ground that an appeal had been taken. The appeal on its face was invalid. Motion to strike off judgment was refused.

Rule to strike off judgment entered on transcript of a justice.

The opinion of the court was delivered November 23, 1885, by

RICE, P. J.—On its face this record is perfectly regular. The transcript was filed October 16, 1874, and shows a judgment entered June 5, 1871, and an execution issued July 5, 1871, which was returned *nulla bona*. We are asked to strike off the judgment upon the ground that an appeal was taken therefrom which is still pending. But, unfortunately for the defendant, this record does not show that any appeal was taken. What appears is, that, on June 22, 1871, "defendant, by her attorney, pays in office five dollars for costs and takes transcript." No bail was entered, no appeal was demanded, nor does it appear that the transcript was

taken for that purpose. It does appear, however, from the record of another case in this court, that this transcript was filed in the prothonotary's office on June 27, 1871, and entitled an appeal; that on November 20, 1871, the defendant's counsel pleaded *non assumpsit*, and that at some time not stated counsel entered their appearance for the plaintiff on the docket. If this is a valid appeal it is so because the entry of appearance by the plaintiff's counsel was a waiver of all irregularities. The cases are almost innumerable which hold that a defective appeal may be perfected, and that defects and irregularities in process and appeals may be waived by appearing and pleading. But, as we look at these records, this is not the case of a defective appeal, but of no appeal, and, while we have not carefully examined the authorities at this time, we doubt greatly whether the mere entry of the names of counsel upon the docket can, upon the principle of waiver, give the court jurisdiction to try the case as an appeal. Be this as it may, we must refuse to strike off the judgment for another reason. The validity of the so-called appeal cannot be conclusively established on this rule. Suppose that, when that question comes regularly before the court, it shall be determined on the facts then presented that there is no appeal, the plaintiff will be in the unfortunate plight of having had his lien destroyed with no power in the court to restore it and thus repair the wrong. This illustrates the wisdom of the rule that where the judgment on the transcript is regular on its face the court will not strike it off. The defendant's statutory remedies to overturn it must be pursued. *Dailey v. Gifford*, 12 S. & R. 72; *Lacock v. White*, 7 H. 495; *Boyd v. Miller*, 2 Sm. 431; *Gehman v. Christ*, 15 W. N. 171. We are not to be understood as deciding that where an appeal is duly taken and filed, a lien can be acquired by filing a transcript subsequently; nor that, where an appeal is duly taken and perfected after a transcript has been filed, the lien of the judgment continues. *Hastings v. Lolough*, 7 W. 540, is an authority to the contrary. All that we decide is, that the transcript and judgment must be allowed to stand for what they are worth.

The rule is discharged.

I. P. Hand, for plaintiff.

Q. A. Gates and A. Darte, for defendant.

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FRIDAY, FEBRUARY 26, 1886.

No. 61

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Court of Common Pleas of Luzerne County.

COON *et al.* v. THE PENNSYLVANIA CANAL COMPANY.

Voluntary payments.

1. Money voluntarily paid cannot be recovered back, even when the payment is made upon a demand which is unjust. To this rule, however, there are certain exceptions, and whether a given case falls under the rule or the exceptions is generally a question of fact to be ascertained by the jury from the evidence.
2. A party may recover back money obtained from him by duress, extortion, imposition, or taking any undue advantage of his situation.

Motion for a new trial.

The opinion of the court was delivered October 15, 1883, by

WOODWARD, J.—The terms upon which the plaintiffs were to have the dredge are set forth in the letter of Wierman to Coon dated April 2, 1881. The language of this letter is as follows: "The terms on which you can use such dredge machine will be the same as last year, namely: \$15 per day for every day and part of a day, from the time the machine is taken away until it is returned, and for each flat \$1 per day. The sum of \$300 to be paid to me before the dredge machine will be removed from our works, and a like sum in a month from that time, or so much as will be needed to keep that amount on hand in advance for the time you may use the machine; settlement to be made monthly as this company may direct; *the engineer, fireman, and dipperman to be appointed by us*, and paid by you weekly as follows: For engineer, \$2.50 per day of ten hours, and for the fireman and dipperman each \$1.75 per day of ten hours. * * * *the boat to be under the entire control of the engineer we shall appoint,*" etc.

The plaintiffs proved that at one time during the progress of the work Kirkpatrick, the engineer, refused to continue operations unless the board bill of himself and the other hands at a hotel in Wilkes-Barre was paid by them; accompanying this demand with the threat that, unless it was complied with, *he would remove the dredge from the river into the canal*. As the plaintiffs were under a contract with the government to complete their work by a certain time, and as no other dredge could be obtained, they yielded to the demand of the engineer, paid the board bills, and wrote to Mr. Wierman on the subject. The latter paid no attention to this letter. Subsequently the plaintiffs sought to have the amounts thus paid by them deducted when settling their accounts with the company. But this was always refused, and then they paid under protest the contract price for the use of the dredge. There was also considerable evidence on the part of the plaintiffs tending to show that the hands furnished by the company to manage the dredge were, if not incompetent, at least very unreliable and irregular in their attention to their duties, and that nothing but the stress of the circumstances induced them (the plaintiffs) to retain the dredge and continue their payments to the company.

We charged the jury that money voluntarily paid cannot afterwards be recovered back by the party paying it, even when the payment is made on an unjust demand. The rule on this subject was stated in almost the exact language of the text writers. Whether the case fell under the general rule or under any one of the exceptions to that rule was, in our judgment, a question of fact to be ascertained by the jury from the evidence before them. The exceptions to the rule that money voluntarily paid cannot be recovered back are tersely stated by Greenleaf (Gr. on Ev. §121) as follows: A party "may recover back money found to have been obtained from him by duress, extortion, imposition, *or taking any undue advantage of his situation*, or otherwise involuntarily and wrongfully paid." An illustration of this is sometimes found in illegal tolls, fees, duties, or taxes paid under protest. In such cases, however, it is held necessary that there should be shown some detention of the goods or of the person, until payment made, to constitute legal duress. But the rule as

stated by Greenleaf and other writers on the subject, is more broad and comprehensive than that defined by these illustrations. Upon a careful re-consideration of this case we are unable to see that any substantial error was committed, either in the admission of evidence or in the charge to the jury, of which the defendants can justly complain. Their view of the case, if correct, would result in compelling the court to take the case away from the jury entirely. We are unable to coincide with them in that view.

The motion for a new trial is denied.

Q. A. Gates, for plaintiffs.

T. R. Martin and H. W. Palmer, for defendants.

Henry Amzi Fuller was born in Wilkes-Barre, January 15, 1855. From all the information in the possession of the family he is supposed to be a descendant of Samuel Fuller, who came to this country in 1620 in the Mayflower. The compact which was made by the pilgrims before landing was signed by forty individuals, among whom were Samuel Fuller, who had two in his family, and Edward Fuller, with three in his family. There is now in the possession of the family a large iron kettle which has passed through successive generations and is supposed to have been brought over on the vessel above named. It is also known that some of Samuel Fuller's descendants settled in Kent, Conn. The first of the name of whom we have positive information is Dr. Oliver Fuller, who was a surgeon in the army during the revolution. His son, Captain Revilo (which is Oliver spelled backwards) Fuller was born in Sherman, Conn., July 26, 1768, and died October 31, 1846, at Salisbury, Conn. He married, July 10, 1791, Rebecca Giddings, daughter of Jonathan and Mary (*Baldwin*) Giddings.

From what particular branch of the Giddings family in England, or who were the immediate ancestors of George Giddings the first of the name here, we are unable to say; but the fact is well authenticated that George Giddings, at the age of twenty-five, and his wife, Jane Tuttle, aged twenty, came from England, in 1635, and settled in the town of Ipswich, about twenty-five

miles from Boston, Mass. Hotten's list of emigrants gives the names of George and Jane Giddings and three servants. The following is a copy taken from "Our Early Emigrant Ancestors," edited by John C. Hotten :

" 2 APRIL, 1635.

"Theis underwritten are to be transported to New England imbarqued in the Planter, Nicholas Frarice, M^a, bound thither, the parties have brought certificates from the Minister of St. Albans, Hertfordshire, and attestacon from the Justices of peace according to the Lord's order :

"George Giddins, husbandman, 25 years.

"Jane Giddins.

"Thomas Carter, 25,

"Michael Willinson, 30, } Servants of George Giddins."

"Elizabeth Morrison, 12, }

They are said to have had as companions on their voyage Sir Henry Vane, fourth governor of Massachusetts, who, in 1662, suffered martyrdom for his zeal in the cause of liberty and religion. "John Tuttle, of Ipswich," says Savage, "came in Ship Planter from London in 1635, ae. 39, with wife Jane, ae. 42, and ch.—Abigail, ae. 6; Simon, ae. 4; Sarah, ae. 2; and John, ae. 1; besides Jane Giddings, ae. 20, and her husband George, ae. 25, who are known to be called children of Tuttle. They had previously lived at St. Albans, Hertfordshire, England, and had embarked April 2, to be joined four days afterwards by several others of the two families. He (Tuttle) died December 3, 1656, at Carric Fergus, where his widow wrote George Giddings as her son, and so called, also, John Simon and John Lawrence. John Tuttle was made freeman March 13, 1639, and representative 1644. After a few years he went home and was established in Ireland in 1654. His wife followed." The history of Litchfield county, Conn., has the following in regard to the Tuttlés: "The Tuttle family came from Devonshire, England, and were probably of Welsh descent. In 1528, and again in 1548, Wm. Totyl was recorder of the ancient city of Exter, the capital of Devonshire, and the second city in England. Wm. Totyl was high sheriff of Devonshire in 1549, and lord mayor of Exter in 1552. He had a son Jeffrey, who was recorder in 1563. Jeffrey bought a fine estate, called 'Pearmore,' in the neighborhood of Exter. The

estate had belonged to Gray, Duke of Sussex, who was executed by the crown. Jeffrey had a son Henry, who was high sheriff in 1624, and from him Wm. Tuttle and three brothers descended, who came to America in the ship Planter and landed in Boston in 1635. The brothers were Richard, who settled in Boston, John in Dover, N. H., and Simon in Ipswich, Mass." That George Giddings was a man of property and position is inferred from the fact that he brought over with him three servants, as in those days only people of means could afford the luxury of servants. He brought with him a letter of recommendation from the rector, or minister, of St. Albans, Hertfordshire. St. Albans is an ancient borough, situate on the top and northern side of a picturesque hill, twenty-one miles northwest from London. The Ver, a small tributary of the Colne, separates it from the site of the ancient Verula, an important station in the time of the Romans, and the scene of a terrible slaughter in the insurrection under Boadicea. In honor of St. Alban, said to have suffered martyrdom here in the year 297, a Benedictine monastery was founded by Offa, king of Mercia, in 796. The foundation of the town is supposed to be due to Ulsig (or Ulsin) who was abbot about one hundred and fifty years later. Two battles were fought near St. Albans during the War of the Roses, in 1455 and 1461. In the first Henry VI. became a captive; in the other he was set at liberty by his brave queen, Margaret of Anjou. The old Abbey church, restored in 1875 by Sir Gilbert Scott, is a cruciform building of irregular architecture, five hundred and forty-seven feet in length by two hundred and six in breadth, with an embattled tower one hundred and forty-six feet high. Mr. Giddings was one of the twenty sworn freeholders who paid the highest rates out of two hundred and thirty in 1644, deputy to the General Court in 1641, 1654, 1655, 1659, 1661, 1663, 1664, 1668, 1672, and 1675. He was a selectman from 1661 to 1675, and for a long time a ruling elder of the first church. He was born in 1608, and died June 1, 1676, and his widow, Jane, died in March, 1680.

Ipswich is said to have been the first place in Essex county known to have been visited by Europeans. In 1611 Captain Edward Hardee and Nicholas Hobson sailed for North Virginia and touched at the place. In 1614 Captain John Smith mentions

Agawam. It was first settled in 1633 and incorporated Ipswich in 1634. John Giddings, son of George Giddings, was born in 1639. He had a commonage granted him in 1667; was a commoner in 1678, and a lieutenant of militia, and was a deputy to the General Court in 1653, 1654, and 1655. He died March 3, 1691. Thomas Giddings, son of John Giddings, was born in Ipswich, Mass., in 1683. He moved to Gloucester, Mass., in 1710, and to Lyme, Conn., about 1722, where he purchased land nearly every year for several years, and settled near Beaver Brook. He married, in 1708, Sarah Butler. Joseph Giddings, son of Thomas Giddings, was born in 1714, in Gloucester, and removed with his father to Lyme. He married, October 24, 1737, Eunice Andruss, or Andrews, of Ipswich, and about 1752 removed with his family to the North Society of New Fairfield, Conn., now Sherman. His name first appears on the church records of New Fairfield North Society October 6, 1752, in connection with the baptism of a daughter "Sarah." On July 15, 1754, he was admitted to the church by letter from the Third church in Lyme. He took an active part in the French war. In the colonial records, 1760, is the following: "This assembly do establish Mr. Joseph Giddings to be Captain of the north company or trainband in the North Society in New Fairfield." In 1775 he was at the head of a committee to build a "new House of Worship." His name is found on the records of the church and society on various other committees, and he seems to have been a leading man in those matters. Jonathan Giddings, son of Joseph Giddings, was born in Lyme, Conn., April 18, 1741, removed with his father to New Fairfield North Society, where he became a thrifty, enterprising farmer. He served in the revolutionary war, enduring many hardships. He was at one time sent by his superior officer at the head of a scouting party as captain, and they were nine days without food, having become lost in the woods, where they were obliged to subsist on roots and herbs. Having received a severe wound he obtained his discharge and returned to his family. He was one of the original proprietors of the Connecticut Western Reserve, in Ohio. In 1786 the state of Connecticut reserved three million five hundred thousand acres of land in northwestern Ohio, which became known as the "Connecticut Western Re-

serve." Its claim on all other government lands was then ceded to the United States. This land was devoted to the use of the state of Connecticut for the *free* education of her children. In 1795 Elijah Boardman, of New Milford, and others, among whom was Jonathan Giddings, purchased, for sixty thousand dollars, a large tract of land on the reserve, the share of Mr. Giddings being one thousand, three hundred and eighty-three acres. He married, January 2, 1766, Mary Baldwin, adopted daughter of Benoni Stebbins, of New Milford, Conn., and daughter of Gamaliel Baldwin, she being then eighteen years of age. He afterwards came into possession of the farm of Mr. Baldwin on the west side of the Housatonic river. This property remained in possession of the Giddings family for about one hundred years. Mr. Giddings died April 8, 1817. Mr. Baldwin was a descendant of Joseph Baldwin, of Milford, one of the first settlers in 1639, born in Milford September 11, 1716, settled in New Milford, where he joined the church August 30, 1741. The widow of Jonathan Giddings married Captain John Ransom, of Kent, Conn., who came from Colchester, Conn., about 1738. Rebecca Giddings, daughter of Jonathan, was born January 2, 1769, and married, July 10, 1791, Captain Revilo Fuller.

Charles Dorrance Foster, of the Luzerne bar, is a descendant of George Giddings through his great-grandfather, Rev. Jacob Johnson, who married Mary, a daughter of Captain Nathaniel Giddings, of Norwich, Conn., a great-grandson of George Giddings and the next youngest brother of John Giddings, son of George Giddings, the ancestor of Henry A. Fuller. George Giddings was also the ancestor of the late Joshua Reed Giddings, the great anti-slavery congressman from Ohio.

Amzi Fuller, son of Captain Revilo Fuller, was born in Kent, October 19, 1793. He obtained as his only fortune the ordinary academic education given to almost every young man in New England, and which has fitted multitudes of them for the discharge of honorable duties in every part of our country. At about the age of eighteen he left home to seek his fortune among strangers. Without friends or money he went to Milford, Pa., a little village on the banks of the Delaware, the county town of Pike county. There he taught a school and entered himself as a student at law

in the office of the late Daniel Dimmick, for many years a distinguished practitioner in the courts of Pike and Wayne counties. Having completed his preparatory studies and obtained admission to the bar, Mr. Fuller removed to Bethany, Wayne county, where, on August 25, 1816, he was admitted to the bar of that county. He immediately opened an office for legal practice, and thus became the first *resident* lawyer in Wayne county. The county at that time was wild, rugged, and sparsely populated. There were no great thoroughfares of business through it, and lumber was the main staple of commerce. The streams being small and difficult of navigation, the lumbering business was a precarious source of wealth, yet it so withdrew attention from agricultural pursuits as to leave the general face of the country unimproved. The legal business was very small. The courts sat but twice a year with juries, and were seldom occupied a week dispatching all the issues, criminal and civil, which arose. Nathaniel B. Eldred, subsequently president judge of the Eighteenth judicial district, had located himself in Bethany, a gay young lawyer of fine manners and commanding talents; and the very able gentlemen then at the bar of Luzerne county attended the courts in Pike and Wayne to share with Messrs. Eldred and Fuller the legal business which seemed scarcely enough for them. And there were Messrs. Mott and Dimmick, of Pike county, in practice also in the same courts. Into Wayne county such as it then was, and attended by this formidable competition, came Mr. Fuller to seek his livelihood. And his dependence was to be wholly on his profession. He had no adventitious aids, and he engaged in no other business. He sat himself down to the careful study of the few law books he possessed, and to the correct transaction of the business entrusted to his care. Cultivating the strictest habits of integrity, industry, temperance, and frugality, he rose rapidly in public confidence, his business increased, and in a few years he was able to marry, to build him a fine house, and to establish himself in circumstances of great comfort. There in the little highland village of Bethany he resided until 1841, accumulating a fortune by faithful attention to a constantly increasing business, and by rigid adherence to habits of economy, which had been forced upon him in the beginning, but

which he never sought to change. He made himself a sound and well read lawyer. No man's integrity was ever more undoubted, and business never suffered in his hands from procrastination, rashness, or unskillfulness. Strictly honest and eminently punctual in all his dealings, his credit with the community became unbounded. Indeed, it is doubted whether his name ever stood a month as debtor on any man's books. He never held but one civil office, and that he sought not, though he was re-appointed to it several times. It was the office of deputy attorney general, which was conferred upon him by successive administrations of various politics for many years, and the duties of which he discharged with the same zeal, punctuality, and skill that characterized all his business transactions. During his residence in Bethany his house was ever open with a ready and an elegant hospitality. He was an efficient supporter of the public schools, and of the interests of religion, as well as of every project for the internal improvement of the county. He loved Wayne county with a pure affection. There had been the scene of his early professional struggles and of his final triumph. He had mixed with the hardy and enterprising people on terms of the utmost familiarity, had assisted them and been assisted by them, and mutual confidence and affection were the growth of such intercourse. Long before he had removed from Wayne county he had the satisfaction of witnessing a great improvement in the face of the country and in the social condition of the people. As the more valuable kinds of lumber disappeared, increased attention was given to farming and its associate comforts; the population, originally from New England, was swelled by a continually incoming tide; turnpikes were projected and built, and finally the works of the Delaware and Hudson Canal Company were introduced which built up towns, created markets, and stimulated enterprise and industry in every department of life. These causes wrought magic effects among the rude hills of Wayne, and have made it a wealthy and interesting county, whilst its population in intelligence and enterprise is equal to that of any county in the state. Very deep and hearty was the pleasure with which Mr. Fuller witnessed the advancement and prosperity of a community with whose interests his own had been

so long and thoroughly identified, and, although he removed his residence to this city, the *amor patriæ* that glowed incessant in his bosom belonged to Wayne. In 1840 an act of assembly was passed providing for the removal of the county-seat of Wayne from Bethany, where he had so long resided, to Honesdale, three miles distant. Having acquired an ample fortune Mr. Fuller determined to retire from the toils of his profession, and the better to do this he waited until after the removal of the county-seat, when he removed to Wilkes-Barre, where his son Henry Mills Fuller, was then already established. While here he did not engage in the active practice of the law, though he continued to act as advisory counsel for many of his former clients. While resident in Wilkes-Barre Mr. Fuller attached all hearts to him. He had cultivated the social virtues with great success, and taken a deep interest in the prosperity of the Protestant Episcopal church, to whose venerable forms he was strongly attached. Though not a communicant in the church, he was a constant attendant upon its services, a liberal supporter of it, an active vestryman, and at the time Bishop Potter was elected Mr. Fuller was an efficient member of the diocesan convention. He was admitted to the bar of Luzerne county January 11, 1822. He died in Kent while on his annual visit to that place with his wife September 26, 1847, in the same room and house in which he was born.

John Ransom Fuller, of Kent, the eldest son of Captain Revilo Fuller, was a man of sound judgment and was highly esteemed; was several times elected justice of the peace and to other town offices, and was captain of a militia company. Robert Nelson Fuller, another son of Captain Fuller, was a highly esteemed resident of Salisbury, Conn. He held various town offices, among others justice of the peace and judge of probate. Thomas Fuller, another son of Captain Fuller, when young obtained a very thorough common school education, at the same time getting a practical knowledge of the manner in which the labor on a New England farm should be performed. But farming was not congenial to his tastes, and he had a strong desire to fit himself for some profession, and his preference was that of the law. Therefore, in 1823, when nineteen years of age, he arranged to

go to Bethany and put himself under the instruction of his brother Amzi, who was a thorough Latin scholar, where he pursued his studies until well fitted for practice, and in 1826 was admitted to the courts of Wayne county. He was admitted to the bar of Luzerne county January 7, 1834. He became a very prominent lawyer, and, although in politics was a whig and the majority in his legislative district was two thousand democratic, he was twice in succession elected to the state legislature. His business and popularity continued to increase as long as he lived, so that before his death he was recognized as standing at the head of his profession in Wayne county. He died at Honesdale December 16, 1843. Revilo Fuller, of Sherman, Conn., another son of Captain Fuller, was a man of stalwart frame, fine appearance, pleasing in his intercourse with others, and exerted great influence in the community where he resided. He was justice of the peace, town clerk, and treasurer many times, a member of the legislature in 1850, judge of probate in 1858, and postmaster. Rebecca Fuller, a daughter of Captain Fuller, married John Torrey, of Honesdale, Pa. He is a son of Major Jason Torrey, who was one of the earliest settlers in northeastern Pennsylvania. Amzi Fuller married, February 10, 1818, Maria Mills, daughter of Philo Mills.

In the seventeenth century three families by the name of Mills resided in Connecticut. First, John Mills, coming from England with Governor Winthrop; second, Lincoln Mills, coming with Captain Newbury to Salem prior to 1635; third, Peter Mills, of Dutch origin, and from whom descended families in Windsor, Kent, and Tarringford. Pieter Wouters Van de Meylyn of Amsterdam, came from Holland and settled in Windsor. Mrs. Wynkoop, daughter of Isaac Mills, while on a tour around the world with her son, the Rev. Mr. Wynkoop, of Washington, D. C., thus writes from Washington, under date of November 27, 1881: "Pieter Wouters Van de Meylyn was born in Holland in 1622, and the first record of his name in America was in 1666. His father was a Dutch nobleman, knighted in consequence of improvements which he made in the construction of dikes or canals. While a student in the University of Leydon he fell under his father's displeasure on account of his religious views,

was disinherited and, for conscience sake, fled to America, landing in Boston. He was twice married. First, to Dorcas Messinger, born September 23, 1650, died Windsor May 18, 1688; second, to Jane Thamsin, of Hartford, to whom he was married December 10, 1691. He had four children, Peter being the eldest. For reasons now unknown he petitioned the colonial legislature to have his name changed to Peter Mills, as appears from the records now preserved at Hartford, but the date is not mentioned. The family settled in Windsor, where he died; date unknown. The Van de Meylyns in Holland are now, and ever have been, a highly respectable family. Several of its clergymen have been distinguished for piety and good judgment. They think much of their American relatives. The old father in Amsterdam was wealthy, and upon hearing of his death one grandson took out papers to prove his right to a portion of his estate, but the ship and all on board were lost, January 22, 1730. Peter Mills, son of Pieter Wouters Van de Meylyn, or Mills, appears to have been a man of uncommon force of character and eminent piety. He married, July 21, 1692, Joanna Porter, daughter of John Porter, a Wealthy landowner of Windsor. The 'Mills farm' was in Bloomfield, the northerly part of Windsor, a beautiful spot commanding an extensive view of valley, hill and river. Until recently the dwelling remained, but a grove of trees still marks the place beside the old homestead once occupied by the pious old Dutchman, our forefather." Peter Mills had nine children, among whom were Peletiah A. Mills, born 1693, graduated from Yale College and became a lawyer; Rev. Jedediah Mills, born 1697, graduated from Yale 1722, became pastor of the church in Ripton, and with him studied the eminent missionary David Brainard; John Mills, born 1707, farmer, one of the first settlers in Kent, Conn., born in Windsor, married Jane Lewis, of Stratford, Conn. She was born in Stratford 1712. He was drowned in the Housatonic river June 7, 1760, aged fifty-three, was selectman at the time of his death, and was superintendent of a bridge. He had carried a woman over and was drowned coming back. Rev. Ebenezer Mills, born 1712, graduated at Yale 1738. Rev. Gideon Mills, born 1715, graduated at Yale 1737. Mr. Mills was once asked "How did you educate four

sons at Yale College and give each a profession?" He replied, "Almighty God did it with the help of my wife." Ruth Mills, granddaughter of Rev. Gideon Mills, married Owen Brown, father of John Brown, "Whose soul is marching on." A sister of Ruth married Mr. Humphrey, father of the president of Amherst College. John Mills had eight children. His fifth child was Rev. Samuel Mills, who was born May 17, 1743. He was the noted "Uncle Sam" Mills, of Torrington, and father of the missionary, Samuel J. Mills. His sixth child, Jane Mills, married Rev. Joel Bordwell, minister in Kent, Conn., for over fifty years. His seventh child, Sarah Mills, married Rev. Jeremiah Day, of New Preston, father of President Day, of Yale College. His eighth child was Rev. Edmund Mills, of Sutton, Mass. Lewis Mills, his third child, was born October 18, 1738, in Kent. He was a lieutenant in the army of the revolution. Married Hannah Hall July 26, 1759. She came from the southern part of Connecticut. Her mother's name supposed to be Bradley. Lieutenant Mills died April 4, 1782, in the forty-fourth year of his age. Mrs. Hannah Mills died April 4, 1804, aged sixty-four, the old Mills homestead, where she lived with her son Philo. Colonel Philo Mills, sixth child of Lieutenant Lewis Mills, was born September 5, 1774, married Rhoda Goodwin, of Torrington, Thanksgiving Day evening, November 17, 1797, by Rev. "Uncle Sam" Mills, of Torrington. Rhoda Goodwin was born in Torrington June 4, 1774. The Goodwins came from England. Philo Mills was captain, major, and colonel successively of the Thirteenth Regiment in the Connecticut Militia. He died July 31, 1863, aged eighty-eight. His wife died September 26, 1861, aged eighty-seven. They were married sixty-three years and no death occurred in the family. Maria Mills, the wife of Amzi Fuller, was born April 7, 1799, and died August 24, 1885. She was the eldest child of Philo Mills. Colonel Mills was the great-grand-father of Henry Amzi Fuller, and also of John Slosson Harding, of the Luzerne bar.

Henry Mills Fuller, son of Amzi Fuller, was born at Bethany June 3, 1820. At the age of fifteen he was sent to the College of New Jersey, at Princeton, to attain and perfect his education, which was pursued with a view of his entrance upon the more

trying and intricate study of the law. An early fondness for argument and a peculiar forte as a declaimer induced his parents to train him for the bar. Mr. Fuller remained in Princeton until the year 1838, when he graduated with the highest honors. As a member of the Cliosophic Society of the college, he was selected to deliver the Fourth of July and commencement orations, and his brilliant future was then foreshadowed in these collegiate exhibitions. After graduation he commenced reading law under his father's instruction, but soon removed to Wilkes-Barre and pursued his studies in the office of the late George W. Woodward, ex-chief justice of the supreme court of Pennsylvania, and was admitted to the practice of the law by the courts of Luzerne county January 3, 1842. Mr. Fuller assiduously improved himself in the practice of the law after his admission and secured a large and remunerative clientage. He took an active part, though never a mere partisan, in support of Taylor and Fillmore in the Rough and Ready canvass of 1848, and at the October election of that year was supported by the whigs of Luzerne county for representative, more as a compliment to his unusual merit than with a hope of securing his election. Mr. Fuller stumped his legislative district and carried it triumphantly by one thousand five hundred majority, against a popular democratic nominee, though Morris Longstreth, the democratic candidate for governor, had at the same time about eight hundred majority in the county and General Cass near five hundred at the presidential election. It was during this session of the legislature that strenuous efforts were made and required for appropriations towards the completion of the North Branch Canal, and Mr. Fuller, although a young member, was selected by those interested in this important project as the champion of their cause in the house of representatives. His speech on this subject was a powerful effort, a master-piece of oratorical rhetoric, replete with statistics and convincing arguments, and to its electrical effect may be attributed the successful issue of the effort and the "moving of the waters" which opened to trade and commerce those regions of mineral and agricultural wealth which, without this important improvement, would have long lain unproductive and dormant. In 1849 the whig state convention conferred on Mr. Fuller the

honor of a nomination for canal commissioner, well knowing that his personal popularity would add strength to their ticket. In this they were not disappointed. In all the counties on the "North Branch" he ran ahead of the Taylor electoral ticket of the year before upwards of two thousand votes, and, not to be deterred in their efforts to overthrow the democracy in one of their strongholds, they again in 1850 presented the name of Mr. Fuller as the whig candidate for congress in the district composed of Luzerne, Wyoming, Columbia, and Montour counties, against Hendrick B. Wright, and in the face of three thousand majority in the district, he gallantly carried it and was elected to congress by fifty-nine majority. His election in this instance was contested before the United States house of representatives, where there was a democratic majority of fifty-four. The committee to whom was referred the contested election case reported against him, and, according to custom, the contestants were respectively heard in their own behalf before the bar of the house. On this occasion Mr. Fuller's oratorical powers overpowered his opponent's, and his brilliant effort sustained him in his seat, which was accorded to him by thirteen majority. This was, indeed, a triumph such as few have ever attained surrounded by so many adverse interests and influences. In 1852 he was nominated by the whigs for re-election, and again canvassed the district with Colonel Wright as the candidate of the democrats, but was defeated by a meagre majority of about one hundred, though the district at the presidential election a month afterwards gave General Franklin Pierce three thousand, nine hundred and sixty-eight majority. Having thus each been once successful by a close vote in a district largely democratic, both were again marshaled for the contest by their respective parties in 1854, when Mr. Fuller cleared the course by some two or three thousand majority, although William F. Bigler, the democratic candidate for governor, carried the district at the same election by two thousand, two hundred majority. In 1855, notwithstanding his own wishes and repeated declinations, his ardent admirers and many friends in congress insisted on supporting him for speaker of the house of representatives, and it is to be regretted, with his well earned experience, business talents, and eloquence, that he was not sus-

tained irrespective of party predilection and elected to that elevated position. The house of representatives at that time was constituted as no other has ever yet been. No party had a majority of its members, while two separate organizations *seemed* to have. The "Americans" had chosen a majority; so had the "Republicans," or opponents of the policy embodied in the Nebraska Bill; but the lines of these two organizations ran into and crossed each other. The republicans who were anti "Know Nothing" were perfectly willing to support an anti-Nebraska "American" for speaker; but nearly all the southern "Americans" would support no candidate who was in principle a republican. Thus, there was, in fact, no majority of any party, and a long, bitter, exciting struggle for the organization was inevitable. The contest for the speakership continued for nine weeks. For the first week Mr. Fuller was supported by the Pennsylvania delegation with unwavering fidelity with one exception—that of Mr. Allison. Had the delegation continued for another week unitedly and inflexibly in his support, there remains little doubt that he would have become the rallying point of the moderate and national minded men from all sections. His conduct during the protracted and wearisome struggle commanded the admiration of all who witnessed it. He turned neither to the right nor left, but moved straightforward, boldly and fearlessly avowing his sentiments whenever called upon to do so, caring not a jot whether his so doing would benefit or injure his prospects of an election; but saying every time that he wished not to be in the way of an election, and desiring those who voted for him to drop his name whenever they pleased. Honest, fearless, and independent as he was ever known to be by all who knew him, and so universally conceded by those who differed with him, he would not falsify his own convictions and proclaim views inconsistent with them, though by so doing he might have driven Mr. Banks, who was elected, out of the contest and attained the speakership for himself. During the contest, in answer to certain interrogatories, Mr. Fuller explained his position as follows:

Mr. Clerk, I voted for the resolution offered by the gentleman from Tennessee [Mr. Zollicoffer] yesterday, because I cordially approve of the principle embodied in that resolution. Early

in the session I felt it a duty, in justice to myself and to those with whom I had been acting, to declare the opinions I entertained and the course of action I should pursue upon certain questions of public policy. I desire to say now, sir, what I believe is known to the majority—if not to all—of those who have honored me with their confidence, that I have been ready at any and all times to withdraw my name from this protracted canvass. I have felt unwilling to stand, or to *appear* to stand, in the way of any fair organization of this body.

In answer to the specific interrogatories here presented, I say that I do not regard the Kansas and Nebraska bill as promotive of the formation of free states; and I will further say, sir, that I do not believe that it is promotive of the formation of slave states. The second interrogatory relates to the constitutionality of the Wilmot proviso. I was not a member of the Congress of 1850, and have never been called upon to affirm or deny the constitutionality of the Wilmot proviso.

I have never assumed the position, that "if territorial bills (silent upon the subject of slavery, and leaving the Mexican laws to operate) were defeated, he [I] would vote for a bill with the Wilmot proviso in it." That question relates to the legislative action of the distinguished gentleman from Illinois [Mr. Richardson.] My political existence commenced since that flood. I was not a member of that congress, and having never taken any public position upon that subject heretofore, I am willing, in all frankness and candor, to do so now; and I do so with great deference and respect for those distinguished men who, in times past, have entertained and expressed different opinions. Public history informs us that slavery existed before the constitution, and, in my judgment, now exists independent of the constitution. When the people of the confederated states met by their representatives in convention, to form that constitution, slavery existed in all but one of the states of the confederacy. The people, through their representatives, having an existing and acknowledged right to hold slaves, conceded this—the right to prohibit importation—after the year 1808. They made no cession, so far as regarded the existence of domestic slavery. They claimed—and it was granted—the right of reclamation in case of escape. They claimed—and it was granted—the right of representation as an element of political power. And I hold, in the absence of express authority, that congress has no constitutional right to legislate upon the subject of slavery. I hold that the territories are the common property of all the states, and that the people of all the states have a common right to enter upon and occupy those territories, and they are protected in that occupation by the

flag of our common country; that congress has no constitutional power either to legislate slavery into, or exclude it from, a territory. Neither has the territorial legislature, in my judgment, any right to legislate upon that subject, except so far as it may be necessary to protect the citizens of the territory in the enjoyment of their property, and *that* in pursuance of its organic law, as established by congressional legislation. When the citizens of the territory shall apply for admission into the Union, they may determine for themselves the character of their institutions (by their state constitution); and it is their right then to declare whether they will tolerate slavery or not, and thus, fairly deciding for themselves, should be admitted into the Union as states without reference to the subject of slavery. The constitution was formed by the people of the states for purposes of mutual advantage and protection. The states are sovereignties, limited only so far as they have surrendered their powers to the general government. The general government, thus created and limited, acts with certain positive, defined, and clearly ascertained powers. Its legislation and administration should be controlled by the constitution; and it cannot justly employ its powers thus delegated to impair or destroy any existing or vested rights belonging to the people of any of the states.

In addition the above he made the following answer to Mr. Barksdale's interrogatories:

Mr. Clerk, I shall answer the questions specifically and directly, reserving to myself the privilege of more full explanation hereafter.

"Are you in favor of restoring the Missouri restriction, or do you go for the entire prohibition of slavery in all the territories of the United States?"

I am opposed to any legislation upon those subjects, for reasons already given.

"Are you in favor of abolishing slavery in the District of Columbia and the United States forts, dock-yards, etc.?"

I am not, sir.

"Do you believe in the equality of the white and black races in the United States, and do you wish to promote that equality by legislation?"

I do not, sir. I acknowledge a decided preference for white people.

"Are you in favor of the entire exclusion of adopted citizens and Roman Catholics from office?"

Mr. Clerk, I think with General Washington—and he is a very high authority—that it does not comport with the policy of this country to appoint foreigners to office to the exclusion of native-born citizens. But I wish to say that I proscribe no man because of his religion; I denounce no man because of his politics. I accord to all the largest liberty of opinion and of expression, of

conscience and of worship. I care not, sir, what creed a man may profess; I care not to what denomination he may belong; be he Mohammedan, Jew, or Gentile, I concede to him the right to worship according to the dictates of his own judgment. I invade no man's altar, and would not disturb any man's vested rights. Whatever we have been, whatever we are, and whatever we may be, rests between us and heaven. I allow no mortal to be my mediator; and, judging no man, will by no man be judged. With regard to those of foreign birth, I do not desire to exclude them. I say to them: "Come, enter upon the public lands; occupy the public territory; build up for yourselves homes, acquire property, and teach your children to love the constitution and laws which protect them;" but I do say that in all matters of legislation, and in all matters of administration, *Americans should govern America.*

"Do you favor the same modification of the tariff now that you did at the last session of congress?"

I was not a member of the last congress; and all that I would now ask upon the subject of the tariff is, "to be let alone."

In 1856, for the convenience of giving more attention to some matters of business with which he was entrusted, he removed to Philadelphia, and continued to reside there until his death. He was one of the foremost in developing the coal and iron interests of this region. Probably no person had done more for that interest in the Wyoming and Lackawanna Valleys than he, and he also had large investments in the great Montour Iron Works, at Danville, which continued until the time of his death. In 1860 it was generally conceded that Mr. Fuller would be the nominee for vice president of the constitutional union party, but he would not permit his name to be used for that position, as he conceded that Edward Everett, who had done so much for the ladies of the Union towards purchasing the home of Washington, had greater claims than he, and Mr. Everett was accordingly nominated. Mr. Fuller was a member of the union national central executive committee, in the same year chairman of the constitutional union state executive committee of Pennsylvania and candidate for congress in the Second district of Pennsylvania. He was, of course, defeated with the rest of his ticket. He died December 26, 1860. The *Luzerne Union*, of Wilkes-Barre, a newspaper always politically opposed to him, in speaking editorially of his death, said:

"Probably no one could have been removed from us whose loss would have been more deeply felt. His kindness of heart, his noble nature—generous to a fault, and never known to do a mean act—his fine talents, his large business relations, all conspired to endear him to our people, and a large circle of friends from one end of the Union to the other. We can hardly be reconciled that one so loved, so full of hope and promise and usefulness, in the noontide of life and of success, should be stricken down when so many are left to whom death would be a relief from the troubles and sufferings of old age and decrepitude. But we must bow to 'the will of Him who doeth all things well.'"

He left seven children to survive him. His eldest daughter married Charles E. Rice, president judge of Luzerne county, and the next oldest, George Reynolds Bedford, of the Luzerne bar. John Torrey Fuller, his youngest son, who was educated at La Fayette College, Easton, Pa., had a remarkable talent for drawing. His topographical map of the college grounds was sent by the college for exhibition at the centennial exhibition in 1876. He graduated the same year with the highest honors of his class. Taking a post graduate course he received the degree of civil and mining engineer, and was connected with the state geological survey of Pennsylvania, with a residence and office in Philadelphia, where he died January 22, 1880, of pneumonia. He was also for a time principal of the Dallas Academy, in this county.

The wife of Henry Mills Fuller and mother of Henry A. Fuller is Harriet Irwin Fuller (*née* Tharp). Her father was Michael Rose Tharp, of Philadelphia, who came with his father's family from Ireland prior to 1800. In the early years of this century he was an agent for the Pennsylvania land-holders in Bradford county, and built himself a beautiful residence on the bank of the Susquehanna river at Athens. He afterwards sold the same to Judge Herrick. Mr. Tharp's mother was a sister of R. H. Rose, M. D., from whom Montrose, in Susquehanna county, received its name. Her father, a Scotch gentleman, and his mother, a lady of Dublin, came to the United States a little before the revolutionary war and settled in Chester county, Pa. The wife of Doctor Rose was Jane, daughter of Andrew Hodge, jun., of Philadelphia, a cousin of Charles Hodge, D. D., LL. D., father of F. B. Hodge, D. D., of this city. The mother of Harriet Irwin

Fuller was Jerusha Lindsley, a daughter of Judge Eleazer Lindsley, of Lindsley, Steuben county, N. Y., where she was born January 19, 1793. Judge Lindsley was a native of Morristown, N. J., where he was born July 3, 1769. He married, April 23, 1787, Eunice Halsey, daughter of Jeremiah and Elizabeth Halsey, of Bridghampton, N. Y. Jeremiah Halsey was the ancestor of Gaius L. Halsey, of the Luzerne county bar. Emila Lindsley, another daughter of Judge Lindsley, was the wife of the late George M. Hollenback, of this city. Polly Lindsley, another daughter, married James Ford, of Perth Amboy, N. J., and became the ancestor of Benjamin Ford Dorrance, of the Luzerne bar. Judge Lindsley was a son of Colonel Eleazer Lindsley, a hero in the war of the revolution. He was born December 7, 1737, O. S., and married Mary Miller November 11, 1756. The Lindsleys are of Scotch descent, and trace their family back to the time of Sir William Wallace.

Henry Amzi Fuller was educated in the public schools of this city, from which he graduated, and was prepared for college by Fred. Corss, M. D., of Kingston, entered the sophomore class of the College of New Jersey, at Princeton, from which he graduated in the class of 1874. He read law with Henry W. Palmer, and was admitted to the Luzerne county bar January 9, 1877. Mr. Fuller married, November 20, 1879, Ruth Hunt Parrish, a daughter of the late Gould Phinney Parrish, of this city. They have four children: John Torrey Fuller, Esther Fuller, Henry Mills Fuller, and Charles Parrish Fuller. Gould P. Parrish was born in Wilkes-Barre in a building where the Exchange Hotel is now located, May 1, 1822. He served an apprenticeship in the mercantile business with the late Isaac S. Osterhout, and then engaged in the manufacture of powder with the late George Knapp, under the firm name of Knapp and Parrish. They first constructed a mill on Solomon's creek, near the city line, and subsequently built the Wapwallopen mills, in Hollenback township, now owned by the Duponts. He relinquished the manufacture of powder and went into the coal business in partnership with the late Thomas Brodrick, and operated the works of the Philadelphia Coal Company, now the Empire mines. He afterwards became a contractor and laid the first pipes for the Wilkes-

Barre Water Company. He continued the business of contractor during the remainder of his life. He died in this city November —, 1875. Gould P. Parrish was the son of Archippus Parrish, a native of Windham, Conn., where he was born January 27, 1773. In his early manhood he removed to Morristown, N. J., and there married Phebe, daughter of John Miller, August 12, 1806. He engaged as a contractor and built the turnpike from Morristown to Paulus Hook (now Jersey City). He removed to the Wyoming Valley in 1812, and for a short time resided in Kingston. He then removed to Wilkes-Barre and kept a hotel where the Exchange Hotel now stands. Here George H. Parrish, of this city, was born. In March, 1824, Colonel Gould Phinney, with fourteen others, removed from the Wyoming Valley to Dundaff, Susquehanna county, Pa. Among them was Archippus Parrish, who took charge of the Dundaff Hotel, and while a resident there Charles Parrish, of this city, was born. Mr. Parrish remained in Dundaff about four years, and then removed to Wilkes-Barre. He again took charge of a hotel located on the site of the present Wyoming Valley House. He then removed to the hotel he had first occupied in this city, and which shortly afterwards burned down. The family for a few weeks were obliged to live in the old court house. He then removed to the Drake house, on Main street, next to the present *Union Leader* office, and there kept a hotel. He subsequently built and kept a hotel on East Market street, near the old jail. About 1839 he retired from business and removed to a farm house at the corner of Canal and South streets, in this city, and resided there until his death, October, 1847. The wife of Gould P. Parrish was Esther, daughter of John Smith, M. D., who was a descendant of Captain Timothy Smith, or, as he was more frequently designated, Timothy Smith, Esq. He seems to have been a leading man in the Susquehanna Company at their meetings in Hartford, before settlements were made in Wyoming. Choosing Kingston for his residence, his name is recorded as one of the Forty, or earliest settlers. The old Westmoreland records frequently contain his name, and it is evident that he was an active, thorough business man, commanding confidence and respect. The sobriquet given him by the ancient people shows the esti-

mation in which he was held. Of course all were anxious to induce the legislature of Connecticut to recognize the settlement on the Susquehanna and extend her jurisdiction and laws therein. Among the agents sent out was Mr. Smith, and to his superior management they ascribed the success of his mission in inducing Connecticut to establish the town of Westmoreland. "Hence," said Mr. John Carey, "the settlers gave him the name of 'Old Head.'" He always conducted whatever affairs were entrusted to him with spirit and prudence, showing that he was a wise and safe counsellor and an active citizen. On May 6, 1773, he was appointed one of "a committee to attend the meeting of the Company at Hartford, on June 2nd, to lay the circumstances of the settlers before said meeting." On June 28, 1773, Mr. Smith, with John Jenkins and others, were appointed "to draw up a plan of regulations and submit the same, together with the former plan, at the next meeting." At a proprietors' meeting held July 8, 1773, Timothy Smith was chosen by this company to be their sheriff. On September 21, 1773, Captain Z. Butler and Mr. T. Smith were appointed agents to attend the General Assembly at New Haven in October next. On December 8, 1773, Mr. Joseph Sluman, Mr. Timothy Smith, and Mr. John Jenkins were appointed agents to General Assembly at Hartford in January next, second Wednesday. It would seem that in April, 1774, four representatives were chosen or appointed. Among the votes recorded is this: "That Zebulon Butler, Esq., Captain Timothy Smith, Christopher Avery, and John Jenkins be appointed agents from the town of Westmoreland to lay our circumstances before the General Assembly in May next. Sept. 30, 1774." His son, Benjamin Smith, was a physician. He married Wealthy Ann York, daughter of Amos York, of Wyalusing.

Amos York, from Voluntown, Conn., is believed to have been the pioneer settler of Mechoopany township, now in Wyoming county. He came in 1772, built a log house and enclosed a considerable tract of land opposite and above the mouth of the Meshoppen creek. In 1778 he, with others, petitioned the Assembly of Connecticut for an abatement of their taxes, since they had suffered much from being robbed and plundered by the Indians. Subsequently he removed to Wyalusing. Manasseh Miner, the

father of Mrs. York, was one of the original proprietors in the Susquehanna company, and conveyed a right to his daughter, and Mr. York made the pitch on which the right was to be located at Wyalusing on some of the Indian clearings. Here he had carried on his improvements with considerable success. He had erected a good log house, a log barn, and had a considerable stock of horses, cattle, sheep, and hogs, and raised sufficient quantities of grain for their support. At the breaking out of the revolutionary war he was known as an active and ardent whig, which arrayed against him the enmity of his tory neighbors, Apprehending trouble from the Indians in the fall of 1777, he went down to Wyoming to seek the advice of friends and make arrangements for the removal of his family. It was then thought there would be no danger from the savages in the winter, and, if in the spring they continued to favor the interests of the British, there would be ample time to seek the protection of the lower settlements. The capture of some of his neighbors occasioned new alarm, but there seemed to be no alternative but run the risk of being undisturbed until spring. To move his family sixty miles through a pathless wilderness in the depth of winter could not be thought of. On February 12 and 13, 1778, there occurred a severe snow storm. Each evening a negro from the old Indian town came to Mr. York's on a trifling excuse and remained until late in the evening. On the 14th the storm ceased and Mr. York determined to find out the reason for the negro's strange conduct. Immediately after breakfast he set out on horseback on an errand to Mr. Pauling's. As to what followed will be nearly in the words of his daughter, Sarah, who was at the time fourteen years of age. She says: "The snow was two feet deep. In the afternoon Miner, his little son, ran in and said the Indians were coming. The family looked out and saw Indians and white men—quite a company—and the children said they were not afraid, for father was with them. Parshall Terry came in first, Tom Green next, and father next. Father took his seat on the bed and drew his hat over his eyes. I went to him and said, 'Father, what is the matter?' He made no answer, but the tears were running down his cheeks. Terry used to boat on the river, and often stopped at our house. When he came in mother said,

'How do you do, Terry?' He replied, 'Mrs York, I am sorry to see you.' Mother said, 'Why? have you taken my husband prisoner?' He answered, 'Ask Tom Green.' Mother said, 'Tom, have you taken my husband prisoner?' He said, 'Yes,' but added that he should not be hurt, only that he must take an oath that he will be true to King George. My mother appealed to him and Terry by the many acts of kindness they had done, represented to them the peaceable, generous, and obliging disposition of her husband, and deplored the wretched condition of the family. After a while Terry lit his pipe, and said to Green, 'It is late, and we must be going.' They then drove the cattle into the road, stripped the house of every thing of value they could carry away, broke open the chests, tied up the plunder in sheets and blankets and put the bundles on the backs of the men. Father had to take a pack of his own goods. When they had got prepared to start, my father asked permission to speak to his wife—he took her by the hand, but did not speak. When the company started my father was compelled to walk, carry a bundle, and assist in driving his cattle, while his favorite riding mare carried 'Terry.' The journey was a tedious, toilsome one for the captive. He was held a prisoner for about nine months, during which time he was subject to exposure and want, and endured all manner of hardship and suffering, not the least of which was the constant anxiety for the welfare of his family, who were left destitute in the midst of winter and far from friends on whom they could call for aid in their distress. The narrative continues: "After the company had gone and no more was to be seen of father, my mother and sister, Wealthy, started down to the town of Wyalusing to see what had been done there. When they came to the village they found only two women, the wives of Page and Berry, and some children, whose I do not recollect. My mother stayed there awhile and then came back. * * * That night we expected every moment that the Indians would come and kill us, or take us prisoners. We sat up and waited for the Indians all night. Next morning my mother and the older children concluded to move the family down to Wyalusing. We had eight fat hogs in the pen and a crib of corn. The bottom of the crib was opened and the hogs let out so they could

get what corn they wanted, and we all started for the village, taking what we could of necessities. My eldest sisters went every day and brought some things out of our house. We lived in this village in one of the cabins about three weeks. One night a man came to our cabin and handed my mother a letter from my father. His name was Secoy [John Secord], a tory. While he was in the house my brother, Miner, came in and said there were three men coming. Secoy said, 'Mrs. York, for God's sake, hide me.' She threw some bedding over him on the floor, and then went and stood in the door. The men came up. They were Captain Aholiab Buck, her son-in-law, Miner Robins, my mother's sister's son, and a Mr. Phelps. My mother told them not to come in, but to cross the river and stay at Eaton's that night; that Eaton was the only man left in the settlement; that early in the morning she and the children would be ready to go with them. They crossed over as my mother advised. She then told Secoy he might get up. He said he was hungry and mother gave him something to eat. He said she had saved him, and he would save her; that his son was at the head of a body of Indians close by, and he was sent as a spy to see if there was any armed men there. Next morning Captain Buck came over and we all started on foot and travelled ten miles towards Wyoming, with no track except what the three men made coming and going. The first house we came to was Mr. Van der Lipp's. My mother and two of the older sisters went on next day with Captain Buck, the rest of the children staying at Van der Lipp's until spring, when Mr. Phelps took us away in a canoe to his house. Afterwards Miner Robbins took us in a canoe to Wyoming fort, where mother was." As affording some idea of the value of Mr. York's improvements at Wyalusing, Mrs. Carr (Sarah York) says the Indians took off one yoke of oxen, one yoke of four-year-old steers, one horse, eleven good cows, and a number of young cattle. There were besides, eight fat hogs, store hogs, sheep, fowls, etc.; that he had sufficient hay for his stock, three hundred bushels of corn in the crib, besides other grain. When it is remembered that this was on hand the latter part of February we may infer that his crops were quite abundant. Including clothing and bedding taken off by the enemy, she estimates the

loss to the family at one thousand, three hundred and ninety-five dollars. Mrs. York and her family took refuge in Forty Fort, where she maintained herself by cooking for the garrison stationed there. Here she remained until after the battle, in which Captain Buck fell, in the twenty-seventh year of his age, leaving an infant daughter born March 25, 1778, and who afterwards became the wife of Major Taylor, of Wyalusing. Speaking of the evening of the battle, Mrs. Carr, whose narrative I have quoted, says: "Some crawled in on their hands and knees, covered with blood, during the night. The scenes of that night cannot be described—women and children screaming and calling, 'Oh, my husband!' 'my brother!' 'my father!' etc. Next morning after the battle Parshall Terry came with a flag and written terms from Tory Butler to Colonel Denison. He told Denison if he surrendered peaceably not a soul should be hurt, but if he refused the whole fort should be put to the tomahawk. My mother went to Colonel Denison and told him that this was the man who had deprived her of a husband and her children of a father, and she could not bear to see him come into the fort; that she had no confidence in his promises, and if he was allowed to come in she would go out. Colonel Denison said she must not go out. She declared she would; called her children to her, went to the gate and demanded a passage out. The sentry presented his bayonet to her breast, and asked Colonel Denison if he should let her pass. The Colonel said no. He then pushed the bayonet through her clothes so that it drew blood. She said to Colonel Denison, 'I will go out with my children, or I will die here at the door.' The Colonel said, 'Let her pass.' We went down along the bank of the river. We could see burning houses on both sides of the river, which the Indians had set fire to. We went on until we got opposite Wilkes-Barre. We saw a woman on the other side of the river and mother called to her to bring a boat over. The woman was a Mrs. Lock, a Dutch-woman. We all got into it, and Mrs. Lock pushed it down the river with all her might. We run all day, and at night we stopped at a house near the bank. Not long after we had been in the house a boy informed us that Lieutenant Forsman was on the bank with a boat load of wounded men. We all got into

our canoe again, and Forsman took a man [Richard Fitzgerald] from his boat to manage the canoe for us, and we run all night. We went down to Paxton, where we stayed until October. At Paxton my mother buried her youngest child, a son of 13 months. He died at the house of Colonel Elder. After a time mother received letters from Wyoming stating that she might return with safety. In October we went up to Wyoming in company with a Dutch family. Captain Buck's widow was with us. We stayed about two weeks at Wilkes-Barre; but, as there was frequent murdering in the neighborhood, mother would not stay. There were three men going through the Big Swamp; mother and her family accompanied them on foot, resolved to make her way to her father's, in Voluntown, Conn. One of the men was Asahel, brother of Captain Buck. We lay one night in the swamp. When we got through it the men left us. We travelled on foot to New Milford, Conn., where mother was taken sick, and it was a fortnight before she was able to travel. When we were at the North river where General Washington lay, an officer informed him that there was a woman in distress. General Washington ordered her to be brought to his tent. She told him her story, and Washington gave her \$50. But we did not need money to bear travelling expenses, for the people on the road treated us with great sympathy and kindness. At New Milford my sister, Buck, was among her husband's relatives. She and sister Esther remained there all winter. From New Milford we were carried in a wagon 100 miles to Windham, from there we travelled on foot a day and a half to Voluntown. When within a mile of her father's a man met her and said, 'How do you do, Mrs. York?' Mother said she did not recollect him. He told us who he was, and said, 'Have you heard about your husband?' She said she had not. Said he, 'I will tell you. He is dead and buried.' Mother looked around on her children, but did not speak. Not another word was spoken by her until she had got to her father's. This was the first intelligence we had of father from the time he was taken, except the letter Secoy brought. He was detained a prisoner at different places 9 months and was exchanged at New York. After his release he went to Mr. Miner's to make inquiries after his family, but could get no

intelligence from them. He declared that he would start in two days, and would find his family if living; but was taken sick, and died 11 days before his family arrived. We all visited his grave that night." The following is a copy of Colonel Butler's pass to Mrs. York, the original of which is still in existence:

"Permit the Bairor, Mrs. York & family, consisting of Nine, to pass from this to Stonington in Connecticut. And I do also Recommend to all Authority, both Sivil and military, to Assist the above family as they are of the Distressed [inhabitants] which were drove from this Town by Indians and torics, and her husband has been a prisoner with the enemy for eight months.

"ZEBU. BUTLER, Lt. Col. Comd'g.

"Westmoreland, Oct. 13, 1778."

I have given the narrative thus full because it presents a vivid picture of the fortitude and heroism of the women of this period of our country's history. Mrs. York was only one of thousands, especially on the border, who endured similar sufferings, and were compelled to exhibit like firmness and self-reliance in the hour of danger or of necessity. Miner Robbins, who was a nephew of Mrs. York, was fatally wounded about the middle of June, 1778, while on a scout up the river. About 1786 the York family returned to their old home. Their house, though standing, was considerably dilapidated, their fences were decayed, and their clearings covered with bushes. During their eight years' absence things had remained very nearly as they left them, except what had resulted from the want of care and labor; even the stick of wood which Mrs. York's son was chopping when he saw the Indians coming with his father, lay upon the ground just as he left it. A less spirited and earnest woman, under such circumstances and surrounded by such painful associations, would have given up all hope and sat down in despair. But her son, who had now become a young man, meeting his responsibilities with manly courage, and aided by his mother's counsel, with great energy set about repairing the injury their farm had sustained during their absence, and his labors were attended with so much success that he was able in a short time to place the family beyond the reach of want. Mrs. York was a prominent woman in the little community where she lived. She died in Wysox October 30, 1818, and was buried in Wyalusing. She was the mother

of twelve children. Her house was the home of the first Presbyterian minister. Her only son who lived to manhood's days was Manasseh Miner York, who became a Presbyterian minister. He was well known and greatly respected and beloved. Abundant in labor, fervent in his zeal for the truth, a consistent Christian, he died in Wysox and is buried in the old burying ground in the rear of the brick church.

John Smith, M. D., son of Benjamin Smith, M. D., and father of Mrs. Esther Parrish, was born in Kingston November 4, 1789. The paternal homestead was on the main road leading from Kingston to Pittston at or near the old Maltby store house. He commenced the practice of medicine at Wyoming in 1812, and there remained until 1835. On August 2, 1819, he was commissioned by William Findlay, governor of Pennsylvania, a justice of the peace for the townships of Dallas, Kingston, and Plymouth. This office he held for a number of years. In 1835 he removed to Wilkes-Barre, and on January 15, 1836, was appointed by Governor Ritner prothonotary, clerk of the Courts of Quarter Sessions, Oyer and Terminer, and Orphans' Court of Luzerne county. On January 3, 1839, he was re-appointed by Mr. Ritner to the same offices for another term of three years. Upon the expiration of his term of office he continued to practice his profession in Wilkes-Barre until the time of his death, which occurred on August 24, 1869. The wife of Dr. John Smith was Mehitable Jenkins, daughter of Thomas Jenkins, of Exeter township. She was the granddaughter of Judge John Jenkins, of Wyoming.

The successful lawyer of two hundred years ago, and even less, counseled and pleaded with a ponderousness that was awe-inspiring to the unlettered. Every other sentence was a legal maxim in the original Latin, and if the parties to the suit and the jurors were not edified and instructed they were, at least, deeply impressed with the wonderful learning of the counselor and advocate. The successful lawyer of to-day is he whose briefs have the merit of brevity in addition to sufficiency, and whose addresses to court and jury are least pedantic and most perspicuous to the common understanding. Mr. Fuller is as yet comparatively young in years and young at the bar, but he has already given conclusive evidence of his liability to pluck the flower suc-

cess from the seed of a plain common sense cultivated and brought to fruition by patient and unassuming industry. He may be said to have inherited inclination and talent for the law, and he has certainly, by a judicious utilization thereof, gained an enviable reputation for one so young. His service as assistant to District Attorney (now judge) Rice was a valuable schooling, of which he made the best possible use. He makes no pretensions to oratory, but pleads, nevertheless, with remarkable ingenuity and force. His practice is one of the largest enjoyed by the junior members of the bar, is a paying practice, and may be depended upon to increase as the years go by. He is one of the few of the younger lawyers, in fact, who will fall heir, by reason of their recognized professional merit, to the business the older ones must surrender as they are called in their turn to appear at the bar of the highest of all courts. Mr. Fuller is a republican in politics, much respected in his party, and if his ambition should so incline him, may reasonably hope for official preferment at its hands. He is in every particular a good citizen and a worthy gentleman.

Court of Common Pleas of Luzerne County.

FILAN v. HULL.

1. A justice of one county may issue an execution upon a certified transcript of a judgment on the docket of a justice of another county, without a previous issue of execution by the latter justice.
2. It is not error to issue a *scire facias* on the certified transcript before issuing execution.

The opinion of the court was delivered January 18, 1886, by

RICE, P. J.—The case of *Moore v. Ridsen*, 3 Clark's C. 409, relied on by the plaintiff's counsel, simply decides that it is error for an alderman to issue an *alias* execution on a transcript of a judgment of another alderman, if the transcript does not show the first to have been returned. It will be seen at once that the decision has no application to the present case. Under the decision in *Keck v. Applebach*, 2 P. & W. 465, it was entirely pro-

per to issue a *scire facias* on the certified transcript before issuing execution.

The exception is overruled and the judgment is affirmed.

W. H. Hines, for plaintiff.

James Mahon, for defendant.

BOOK NOTICE.

FEDERAL DECISIONS. Cases argued and determined in the Supreme, Circuit, and District courts of the United States. Arranged by William G. Myer. Vol. XI., pp. 907. The Gilbert Book Company, St. Louis, 1885.

Benjamin R. Curtis, Esq., has edited this volume. It treats of courts. The powers of judges first receive attention. Under this chapter are fully reported several interesting cases, involving questions of practice and ethics which occasionally arise, e. g., when a judge may be challenged because interested; when he ought not to hear a motion which has already been decided before another judge of the same court. By far the larger portion of the volume is devoted to cases in which the limit of the jurisdiction of the various federal and of state courts on federal questions, are discussed. In this connection we find also the subject of citizenship, where that is necessary to jurisdiction in any phase. In Vols. VI. and VII. we have already seen that privileges and immunities of citizens are fully considered from a constitutional standpoint; here it is viewed from the narrower jurisdictional one. State courts in this volume receive only a small space, a fact explained fully when we turn to the titles Appeals, Constitution and Laws, which we have already reviewed in previous numbers. Moreover a separate title on States and Territories is promised in a future volume. Like the volumes preceding it in the series, it has a well analyzed index and a full table of cases cited. We regard it is one of the most thorough of the set. While from the nature of the subject it has none but a legal interest for the reader, it is all the more valuable to the practitioner's library.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, MARCH 5, 1886.

No. 62

Court of Common Pleas of Luzerne County.

HINTERMEISTER v. THE ITHACA ORGAN AND PIANO COMPANY.

1. Proceedings were begun in New York for the dissolution of a corporation of that state on account of its insolvency. At the same time a temporary receiver was appointed with all the powers of a permanent receiver, and an injunction was issued. The plaintiff was then a citizen of New York and a director and general agent of the company, and had notice of the proceedings. Between that time and the final dissolution of the company he took up his residence in this state. After the final dissolution of the company he issued a foreign attachment—*Held*, 1st, the plaintiff being bound by the appointment of the temporary receiver in New York, other states, upon principles of comity, will give full force and effect thereto.
2. There was no authority for commencing a suit against the receiver for a debt of an insolvent corporation of New York after the complete dissolution. Hence, the receiver cannot be added as a defendant by the plaintiff under the power to amend.
3. The court may in a summary way inquire into its jurisdiction to issue the writ and as to the liability of the defendant or of the property to foreign attachment and dissolve the writ.
4. Rule as to the recognition to be given to foreign receiver considered.
5. Cases collected as to the power of the court to dissolve foreign attachments and practice considered.

Rule to dissolve attachment.

Motion by plaintiff for permission to suggest the dissolution of the defendant corporation, and to add the words "George R. Williams, receiver," to the name of the defendant.

The opinion of the court was delivered September 7, 1885, by

RICE, P. J.—The defendant company was duly incorporated according to the laws of the state of New York, and had its principal office and place of business in Ithaca. On January 2, 1885, a suit was begun by the attorney general of the state for the dissolution of the corporation and for the forfeiture of its corporate rights, privileges, and franchises, it being alleged that for more than one year previous it had been insolvent, and for the same period had neglected and refused to pay its notes and other evidences of debt. On January 5, 1885, George R. Wil-

liams was appointed temporary receiver, with all the powers and authority, and subject to all the duties and liabilities of a permanent receiver, according to the laws of the state of New York, and the practice of the court. At the same time and in the same decree "the defendant company, its directors, officers, agents, and servants, and all persons whomsoever having notice of this order," were enjoined from in any manner interfering with said receiver, and from collecting any of its debts or demands, and from paying out, disposing of, or in any way transferring or delivering to any person any of the money, property, or effects of the said defendant, except to deliver the same to the said receiver; and the company and its directors and officers were also enjoined from exercising any of the corporate rights, privileges, and franchises of the corporation during the pendency of the action, except by express permission of the court. At the time the foregoing order or decree was made the plaintiff was a resident and citizen of the state of New York, and was general agent and a director of the company. He was re-elected a director on January 13, 1885. He admits that a notice of the appointment of the temporary receiver was served on him, and when asked if it did not contain an order restraining the officers of the company and its managers from interfering with the company's assets, he says: "I suppose so. I did not read it particularly that I know of. It may have contained that. I could not say." On January 24, 1885, no defense having been interposed, a decision was entered in which the court found the facts as to the insolvency of the corporation to be as alleged. On the same day the court gave final judgment dissolving the corporation and forfeiting its corporate rights, privileges, and franchises, and also awarded an injunction substantially as above recited, and appointed George R. Williams permanent receiver. In the meantime (January 17, 1885) the plaintiff came to Mahanoy City, in this state, and this, from the date last mentioned, he now claims to be his domicile.

The present writ (foreign attachment) was issued on April 22, 1885. The above rule to dissolve the attachment having been granted, the plaintiff subsequently made a motion to be "permitted to suggest the dissolution of the defendant corporation, and to add the words 'George R. Williams, receiver,' to the name

of the defendant." The rule and the motion are to be disposed of together. If this were the case of a foreign corporation in full possession of its rights and franchises, and in full control of its affairs, the plaintiff could unquestionably, upon a proper cause of action, maintain a writ of foreign attachment in this state whether he is an actual bona fide resident and citizen thereof or not. On the other hand, whether he is such a citizen thereof or not, he could not maintain the writ against a foreign dissolved corporation in the hands of a receiver if the same effect is to be given by the courts of this state to the decree of dissolution and appointment of the receiver as would be given in the courts of the state where the decree was entered. The legal authority of a receiver is co extensive only with the jurisdiction of the court appointing him, or the territorial operation of the law under which he is appointed, and as matter of strict right the courts of one state are not bound to recognize a receiver appointed in another state. But upon principles of comity they will, under certain circumstances, recognize such appointment and give effect to the virtual assignment to him of property which may be within their jurisdiction. "The rule is founded upon the recognized principle that the laws of one state have no force *proprio vigore*, beyond the territorial limits of such state, although upon considerations of courtesy or comity they may be permitted to operate in another state for the promotion of justice when neither the latter state nor its citizens will suffer any inconvenience from the application of the foreign law." High on Receivers, 47. The question then is one of comity. What effect shall be given in this state, as against the present plaintiff, to the appointment of the receiver in the state of New York? In deciding this question let it be assumed, for a moment, that, although the corporation has been dissolved and its corporate rights, privileges, and franchises forfeited, yet it is capable of being sued in the courts of this state by a creditor having a bona fide residence therein, and who is in no way bound by the decree of dissolution. Or, as one judge has expressed it, let it be assumed that the corporation has only suffered a "perpetual paralysis." Hunt v. Col. Ins. Co. 55 M. 290. Even then, can the principle upon which the state holds on to property within its borders for the benefit of its

home creditors be invoked by the plaintiff? We think not. He was a citizen of New York when the company became insolvent and the proceedings to dissolve were commenced, and was bound by the laws of that state. Perhaps this would not be conclusive, but he was moreover a member and director of the company, and as such was bound by the appointment of the temporary receiver, and the accompanying injunction before he changed his residence. Being, for these reasons, bound by the appointment of the temporary receiver, other states upon principles of comity would give full force and effect thereto. It is, therefore, sufficiently accurate to say that, at that point of time the assets of the corporation, of whatsoever nature and wheresoever situated, had against the plaintiff, passed into the custody of the law, and its grasp has never since been relaxed so as to revest them in the corporation. If no final judgment of dissolution had yet been entered that decree would still bind him, and the principle of the decisions in *Mulliken v. Aughenbaugh*, 1 P. & W. 117, and *Bagby v. The A. M. & Oh. R. R. Co.* 5 Nor. 291, would defeat him in his present attempt to avoid its effect. To adopt the forcible language of Chief Justice Agnew, he certainly had no right after the appointment of a receiver by a court within his own state, binding on him there, to attempt to avoid its effect by escaping from its jurisdiction and coming here, to ask us to infringe the comity we owe to the acts of his own courts within their jurisdiction. This being the condition of the plaintiff, when, as alleged, he took up his residence in this state, when did it change so as to entitle him to ask us to refuse recognition to the proceedings which were originally binding upon him? Surely, unless inter-state comity is a mere high sounding term signifying nothing which may not be avoided by a mere technical change of residence, then the plaintiff's case is none the less within the principle upon which it is exercised, although since he came into the state the temporary injunction has become perpetual, the temporary receiver has become permanent, and the corporation has been wiped out of existence. Justice to our own citizens may require that in a contest between them and a receiver or assignee appointed in another state, the former should have the preference, and that, where due process according to our law will reach and hold property suffi-

cient to satisfy their demands, they should not be compelled to release it and to go to the foreign forum to seek such portion of the insolvent estate as the laws of that state will give them. At the same time the true principles of inter-state comity forbid that this commonwealth should invite creditors of other states, and especially of that in which the assignment was made or receiver was appointed, to use our process for the purpose of obtaining a greater share of the insolvent estate than a fair distribution according to the laws of that state will give them. (See further, opinion of Hare, J., in *Perkins v. The Clear Spring Coal Co.* 42 Leg. Int. 297).

Thus far we have treated the case very much the same as an assignment under foreign bankrupt laws, and have not considered the effect of the dissolution of the corporation and the forfeiture of its corporate rights and franchises. In *Farmers' and Mechanics' Bank v. Little*, 8 W. & S. 207, it was held that the dissolution of the corporation, after foreign attachment issued, dissolved the attachment, and that the garnishee might take advantage of this by pleading it, notwithstanding judgment had been entered against the defendant for default of appearance. The authority of this decision, where the principle is not affected by statute, was expressly recognized by Trunkey, J., who delivered the opinion of the court in *Hays v. Lycoming Ins. Co.* 3 Out. 626. It is not questioned here. Recognition of the civil death of the corporation depends not upon principles of comity between states, but upon rules of evidence and principles of law acknowledged wherever the judgments and decrees of courts of competent jurisdiction are respected. It is a fact, which, like natural death, we cannot ignore even for the benefit of home creditors. How, then, can an attachment, issued after the dissolution, be sustained? How can process issue against a dead corporation of another state to compel it to appear in the courts of our state? The counsel, appreciating this difficulty, ask to amend by adding the name of the receiver. We do not doubt that section 2 of the act of May 4, 1852, P. L. 574, relating to amendments, is applicable to an action begun by foreign attachment, but we nevertheless question the propriety of the amendment asked for. The analogy suggested by the plaintiff's counsel between a receiver of a

dissolved corporation and an executor or administrator is not perfect. Speaking generally you may sue the latter but not the former. But suppose both could alike be sued, the analogy would not assist the plaintiff in the decision of the present case, for a foreign executor or administrator cannot be sued by foreign attachment. Again, conceding that in New York a receiver is a statutory assignee (*Yeager v. Wallace*, 8 Wr. 294), and in a certain sense the representative of the dissolved corporation, he is also something more. It is to be observed, to repeat, that, giving due recognition to the appointment of the receiver and his authority, the assets of the corporation were *in gremio legis* at the time the attachment issued. Constructively the receiver is their custodian, or at least has an equitable right to their custody, which, unless paramount rights have attached, all courts will assist him in asserting and maintaining. He is the officer of the court appointing him and is under its protection and control. In order to prevent conflict of jurisdiction, other courts of the same state, and upon principles of comity, courts of other states, will refuse to permit his custody to be interfered with. *Atlantic and Great Western Railway Co. v. Robinson*, 16 Sm. 16. As a general rule it is held to be irregular to make a receiver a party to a proceeding which will interfere with his actual custody, or prevent him from exercising his right thereto, without the consent of the court or the sanction of some statute. *Wray v. Hazlett*, 6 P. C. 155. *Kerr on Receivers*, 208 (note). The distinction between the present case and the cases cited by the plaintiff's counsel is very marked. In *Warren v. The Union Nat'l Bank*, 7 Phila. 156, it does not appear that there was an actual dissolution of the corporation defendant. If that fact was in the case, then it is impossible to reconcile the decision with *Farmers' and Mechanics' Bank v. Little*, *supra*, and the latter must control. The cases of *Hays v. Lycoming Fire Ins. Co.* 3 Out. 621, and *Pickersgill v. Myers*, *Ib.* 602, were attachment executions (which, as the opinions clearly show, differ materially from a foreign attachment) laid before the dissolution of the corporation. In the former case the receiver intervened as a party defendant, as it was his duty to do under section 49 of the act of May 1, 1876, P. L. 66. In the latter case the corporation was the garnishee, and

after a plea had been entered the attachment was dissolved on motion of the receiver. This was held to be error, because the plaintiff could not thus be stripped of his lawful lien on his debtors' property, and the same act was construed to authorize the substitution of the receiver. In *Willeys v. Waite*, 25 New York, 577, the attachment was sustained upon the ground that there was no actual dissolution of the corporation. Judge Sutherland says: "It is plain to us that, notwithstanding its insolvency and the consequent transfer of its property, it continued to have a name and existence as a corporation so far, at least, as to be capable of being sued as such." Our attention has been called to a provision of the New York code, which authorizes a receiver to maintain any action or special proceeding for certain specified purposes. What effect this would have if the attachment in the present case had issued before the decree of dissolution it is unnecessary now to decide. An interesting case upon this question is *Hunt v. Col. Ins. Co.* 55 M. 290. It is enough for the present to say that neither the provision quoted, nor any statute of our own state, authorizes the commencement of a suit against the receiver for a debt of an insolvent corporation of New York after the complete dissolution thereof. For these reasons we conclude that it would be useless and improper to make the receiver a party to this action against his consent. The motion is therefore refused.

Again, it is contended that the questions under consideration cannot be decided and the attachments dissolved in this summary way. The cases chiefly relied on to sustain this proposition are *Neff v. Love*, 2 Miles, 128; *Lorenz v. Orlady*, C. Nor. 226; *Murdock v. Steiner*, 9 Wr. 349; *Lawrence v. Yard*, 15 W. N. C. 190; and *Pleasants v. Cowden*, 7 W. & S. 379. The able arguments of the plaintiff's counsel entitle them to a careful consideration of these cases. We think, however, they are plainly distinguishable from the present case, and numerous other cases where the present summary mode has been followed. The first case was a refusal to quash attachment at the instance of an adverse claimant of the fund. In the second case after an assignment for the benefit of creditors, the debtor acquired a fund which was attached in his counsel's hands. It was held to be

error to dissolve the attachment and to award the fund to the assignee for two reasons: 1st, the right of the parties could not be disposed of in so summary a manner; the defendant and garnishee could appear, plead, and have a trial by jury. 2d, the fund having been acquired after the assignment, the assignee had no right to it, even if he had been in court claiming it. In the third case it was held that the fact that the suit was brought in violation of an agreement to give time was not a reason for dismissing the action, but should have been regularly pleaded and tried. In the fourth case it was held that assignees for the benefit of creditors of the defendant in another state should intervene by petition, and not by rule to dissolve the attachment. In the last case it was held that if a debt due to the estate of a testator be attached for a debt of the executor, who is also residuary legatee under the will, it is error to quash the attachment. That, if nothing else, which distinguishes these cases from the one in hand, is that in none of them was the defendant under any legal incapacity. Under the law they were proper parties and liable to suit. Here, as the case now stands, the defendant is an insolvent and dead corporation.

Again, it is contended that the rule should have been to show cause of action, and if that rule had been taken depositions could not have been read. Amongst other cases our own decision in *Falk v. Wurzbarger*, 14 Luz. Leg. Reg. 211, is relied on. What that case decided is, that as to the cause of action the plaintiff's affidavit, filed pursuant to a rule to show cause of action, is conclusive upon both parties. Counter affidavits cannot be read, nor can the plaintiff be cross-examined thereon, nor if his affidavit is insufficient will supplementary affidavits be received. We have, therefore, not considered the evidence taken on this rule as to the nature of the plaintiff's cause of action. If it was desired to bring that in question a rule to show cause of action should have been entered. But there is nothing in that case, nor in the other cases above cited, which clashes with those precedents in which the courts have, in a summary way, inquired into their jurisdiction to issue the writ, and as to the liability of the defendant or of the property to foreign attachment. The following are some of the precedents. Attachment dissolved upon the grounds, 1st,

that a foreign attachment will not lie against executors; and 2d, that the partnership credits of S. & H. cannot be attached to answer the separate debt of H. *McCooms v. Dunch*, 2 Dall. 73. Attachment quashed on proof that the defendant was still in the state, although avowing an intention to leave. *Lyle v. Freeman*, 1 Dall. 480. Foreign attachment set aside on proof that the plaintiff had obtained judgment for the demand in a sister state upon which an execution had been issued and levy made. *Downing v. Phillips*, 4 Y. 274. Same laid on money paid into court in hands of prothonotary quashed. *Ross v. Clarke*, 1 Dall. 354. Attachment dissolved against one who was actually within the jurisdiction at the impetration of the writ, though a non-resident. *Maule v. Cooper*, 1 W. N. C. 109. Attachment quashed under the same circumstances. *Burns v. Bowers*, 3 W. N. C. 64. Foreign attachment against a resident, but temporarily absent debtor, dissolved by court below and judgment affirmed. *Fuller v. Bryan*, 8 H. 144. Writ quashed even after judgment by default, on its being shown that defendant was a resident of the county. *Kee-gan v. Sutton*, 12 W. N. C. 292. Attachment against foreign executor quashed. *Williamson v. Bell*, 8 Phila. 269. Attachment against county, boroughs, and school board as garnishees dissolved. *Pettebone v. Beardslee*, 1 Kulp, 180; *Van Valkenburgh v. Earley*, 1 Kulp, 216; *Taylor v. Kip*, 2 Pears. 151. Attachment laid on pension money deposited by defendant with his banker, dissolved on motion. *Clark v. Ingraham*, 13 Phila. 646. Foreign attachment against absconding debtor quashed on motion of garnishee. *Scott v. Helgert*, 14 W. N. C. 305. Same for breach of promise of marriage quashed. *Isetts v. Binder*, 2 Ch. Co. R. 430. An attachment against wages will be quashed unless the allegation be traversed on oath. *Miller v. Rush*, 25 P. L. J. 72. Rule by receiver to quash foreign attachment against national bank after its insolvency made absolute. *Bank v. City Nat'l Bank*, 12 Phila. 189. Other cases might be cited, but these are enough to show that, upon the grounds which are the basis of this rule, it is allowable in practice to dissolve the attachment.

The rule to dissolve the attachment is made absolute.

J. V. Darling and G. Mortimer Lewis, for defendant.

George J. Wadlinger and S. J. Strauss, for plaintiff.

Court of Quarter Sessions of Luzerne County.

IN RE DIVISION OF JACKSON TOWNSHIP.

Division of new election district refused where it appeared that the report of reviewers was adverse to the same, that the whole number of votes polled in the township was only about one hundred, that the present polling place was near the centre of the township and was conveniently reached by the public roads therein, and the division was opposed by a large number of the inhabitants including many of the original petitioners.

Report of reviewers to report of commissioners.

The opinion of the court was delivered September 17, 1883, by

RICE, P. J.—In the case of Hunlock township, No. 112 November sessions, 1880, we had occasion to say: "A single poll in a township has its advantages, especially in the spring elections, for it gives the people of the whole township an opportunity to discuss together their township affairs; and thus, in some degree, preserve the features of the town meeting. This is a consideration, probably, of more importance than the slight difference in expense between one and two or more polls, and is not to be disregarded until necessity or the positive convenience of a considerable number of the inhabitants require it." In view of the facts that the report of the reviewers is adverse to the present application, that the average number of votes polled in the township is only about one hundred, and that the whole number of voters in the township as shown by the registry is only about one hundred and forty, that the present polling place is near the centre of the township and is conveniently reached by the public roads therein, and in view of the earnest opposition to the division on the part of a very large number of the inhabitants, including many of those who originally petitioned for the division, this opposition being based chiefly upon the consideration to which we have heretofore alluded, we conclude that we would not be justified in making the division.

Upon consideration of the reports and the evidence, confirmation of the report of the commissioners filed to No. 121 April sessions, 1882, is refused, and the report of the reviewers filed to No. 195 September sessions, 1882, is confirmed absolutely.

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FRIDAY, MARCH 12, 1886.

No. 63

Circuit Court of the United States.

WILLIAMS, RECEIVER, v. HINTERMEISTER.

1. Where a corporation is dissolved by the decrees of the courts of one state, a director of such corporation cannot avoid the obligation to obey the injunction order by removal to another state.
2. A foreign corporation carrying on business of a commercial nature in the state of Pennsylvania is not prohibited from doing business by reason of non-compliance with the laws of the state requiring registration, etc. The legal capacity of a foreign corporation to transact business in the state of Pennsylvania can only be inquired into upon complaint of the commonwealth.
3. Where a receiver has been appointed by a court of competent jurisdiction in one state, the United States Circuit Court will, on proper cause shown, appoint an ancillary receiver in Pennsylvania.

In Equity.

ACHESON, J.—The defendant was a citizen of the state of New York and a director of the Ithaca Organ and Piano Company, a corporation of that state, when judicial proceedings were there instituted in the Supreme Court for the county of Tompkins against the corporation, and the present plaintiff was appointed its temporary receiver. By the admission of his answer, filed here on January 13, 1885, while still such director, the defendant was served with a copy of the order of the court appointing the plaintiff the temporary receiver of the corporation, which order (as is shown by the certified copy of the record now here exhibited) enjoined the directors of the company, and all persons having notice of the order, from interfering with the receiver in the discharge of his duties, and from collecting any of the debts or demands of the corporation, or disposing of or transferring any of its property, etc. The defendant could not avoid the effect of the subsequent decree in said cause made January 24, 1885, dissolving the corporation and appointing the plaintiff the permanent receiver thereof, etc., by leaving the state of New York on January 17, and coming into the state of Pennsylvania. Nor did

he avoid the obligation to obey the injunction order, by escaping from the jurisdiction of the Supreme Court of New York. *Bagby v. R. R. Co.* 86 Pa. St. R. 291. That, in violation of the decrees of that tribunal and to the frustration thereof, the defendant has been interfering with the assets of the corporation in the state of Pennsylvania, and attempting to possess himself thereof and to appropriate them to himself is quite plain from what is now shown. Nor is it a sufficient justification of the defendant's conduct that he himself is a creditor of this company. The corporation has been judicially found to be insolvent and its assets have been sequestered for the benefit of all its creditors and the corporation dissolved by decrees of a competent court which, as we have seen, are binding upon the defendant. *Ibid.* The defendant, indeed, sets up in his answer that the Ithaca Organ and Piano Company being a foreign corporation, unlawfully carried on business in the state of Pennsylvania without complying with certain laws of the state, and it is claimed, therefore, that the court ought not to grant any equitable relief to the corporation or its receiver. I incline, however to think that the transactions of the corporation referred to were strictly of a commercial nature and within the jurisdiction of the constitution of the United States. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727. But, however this may be, I am unable to perceive how it lies in the defendant's mouth to allege the corporation's want of legal capacity to transact business in this state so long as the commonwealth is not complaining of any infraction of its laws. *Goundie v. Northampton Water Co.* 7 Pa. St. R. 233. Moreover, this is not a suit by the receiver, or in his behalf; the suit in the state of New York was an adversary one against the corporation, and this is but an ancillary suit. It is a proceeding in behalf of the innocent creditors of the corporation and to reach its assets. The case is fairly within the principle of the ruling in *Hagerman v. Empire Slate Co.* 97 Pa. St. R. 534, that where a foreign corporation which has done business in the state of Pennsylvania is sued here, it cannot escape service of process and defeat the action by setting up its failure to comply with the laws requiring it to establish an office in the state and appoint an agent upon whom service may be made, etc. The pending of the suit in Luzerne county set up in the answer

is no bar to this suit, if for no other reason, because the present plaintiff is not a party thereto.

There is a large amount of the personal assets of this corporation within this state, and I think it sufficiently appears that a necessity exists for the appointment of a Pennsylvania receiver to collect and take charge of the same; indeed, this court recently, in the case of *Filley et al. v. The Ithaca Organ and Piano Company*, appointed a receiver. But the action of the court in that case has been called in question by the present defendant, who obtained a rule (which is still pending) to show cause why the order of appointment should not be revoked. It is thought to be desirable that the appointment be made in this case, the declared intention being to discontinue the other suit simultaneously with the making of a new order of appointment herein. To this course this court perceives no valid objections.

Let a decree be drawn appointing the receiver and enjoining the defendant as prayed for.

G. Mortimer Lewis and J. H. McCreery, for complainant.

Messrs. Wadlinger and Bruce, *contra*.

Court of Common Pleas of Luzerne County.

LUKE v. SCHLEGER.

Certiorari.

1. Under the act of assembly of March 22, 1877, a justice of the peace is authorised to hold a case under consideration, and defer entering judgment, for ten days after the evidence has all been heard; and this without special notice to the parties interested.
2. A *certiorari* is a substitute for a writ of error, and no point can be raised by it which is not apparent on the face of the proceedings. Depositions and parol proof are only admissible to show want of jurisdiction, or fraud or corruption on the part of the magistrate.
3. Upon *certiorari* all the proceedings of the magistrate, as they appear of record, are to be taken as true.

The opinion of the court was delivered December 7, 1885, by

WOODWARD, J.—The act of assembly of March 20, 1810, (Pur. 985, pl. 58) provides, that in all actions brought before justices of the peace, "if either party or their agents shall refuse to refer, the justice may proceed to hear and examine their proofs and allegations, and thereupon give judgment publicly as to him of right

may appear to belong," etc. If the case be adjourned without day, the justice cannot afterwards enter judgment without notice to the defendant. (See *Brown v. Hambright*, 3 Luz. Leg. Reg. 35.) By the act of March 22, 1877, (Pur. 986, pl. 62) it is provided, that "it shall be the duty of justices of the peace and aldermen of this commonwealth to render judgment in any cause or causes pending before them within a period of ten days after all the evidence in said causes shall have been heard." The second section of this act provides, that "any justice or alderman of of this commonwealth who shall fail to comply with the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding one hundred dollars." In the case before us the hearing took place on May 9, 1885. The parties appeared, the witnesses were examined, and the case was closed. Under the act of March 22, 1877, the justice was authorized to hold the case under consideration and defer entering judgment for the period of ten days, and this without notice. And we are unable to see how the defendant has been deprived of any legal right or subjected to any injury by the action of the justice. It is clear that, in some way, he ascertained the fact that judgment had been entered against him, for within thirteen days thereafter he applied for and obtained this *certiorari*. This case gives us an opportunity to state again what has frequently been said before, that upon *certiorari* all the proceedings of the magistrate, as they appear upon the record, are to be taken as verity. A *certiorari* being a substitute for a writ of error, is governed by the same or strictly analogous principles, and consequently no point can be raised on it which is not apparent exclusively on the proceedings removed by it, and the courts refuse, in all such cases, to enter into the merits, or to decide facts on depositions. Phila. and Trenton R. R. Co. 6 Whar. 41. Where want of jurisdiction, or fraud or corruption in the action of the magistrate is alleged, the facts may be brought before the court by depositions, but such parol proof is not admissible where the object may be gained by suggestion of diminution and rule to perfect the record. (See *Leis v. Yost*, 1 Woodward's Decisions, p. 15).

The proceedings are affirmed.

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FRIDAY, MARCH 19, 1886.

No. 64

Court of Common Pleas of Luzerne County.

REAGAN *v.* STETLER & COMPANY.

The defendant (appellant) should be permitted, *nunc pro tunc*, to file the affidavit required by the wages acts where the transcript discloses any uncertainty as to the plaintiff's claim being within them.

Rule to strike off defendants' appeal from the judgment of a justice of the peace.

The opinion of the court was delivered September 7, 1885, by

RICE, P. J.—If it clearly appeared that the demand of the plaintiff before the justice brought the case within the general act of April 20, 1876, P. L. 43, or our local act of February 28, 1870, P. L. 269, the omission of the defendants to file an affidavit as required by those acts, would be cause for striking off the appeal without a preliminary rule upon the defendants to perfect it. (See *Gordon v. Snyder*, 2 Kulp, 308). It is very clear, however, that the case does not come within the provisions of the former act, for the reason that the transcript does not show that the plaintiff's demand was for the wages of manual labor. *Wolemsdorf v. Heifner*, 14 W. N. C. 24. There is also some room for question whether the transcript shows the case to be within the provisions of the act of 1870; for it is not every demand for "work and labor done" that can be regarded as the *wages* or *salary* for work or labor done within the meaning of the act last referred to. *Zeigler v. Everhart*, 2 Kulp, 360. "Every requisite to bring the case within the act should appear upon the docket of the justice clearly and not argumentatively. It is especially proper to apply this rule where one of the parties is attempting to deprive his opponent of a trial by jury." *Wolems-*

dorf v. Heifner, *supra*. In view of the uncertainty, and of the fact that the defendants' failure to file the affidavit was not in bad faith or with any apparent intent to set at naught the requirements of the statute, we think the application to file the affidavit now should be allowed.

Rule discharged upon condition that the defendants, within ten days from this date, file the affidavit required by the act of February 28, 1870, otherwise rule absolute.

John T. Lenahan, for plaintiff.

Allan H. Dickson, for defendants.

Court of Common Pleas of Luzerne County.

ROW v. HADDOCK *et al.*

1. The fair and reasonable construction of the act of June 29, 1881 (P. L. 147), is, that the employee may decline to receive anything but cash, or an order redeemable in cash, in payment of his wages, but if he does receive goods *in payment* he waives his right to demand cash.
2. Not decided whether the employer has the right of setoff, notwithstanding the act of 1881.

Case stated.

The opinion of the court was delivered October 31, 1885, by

RICE, P. J.—The following facts are agreed upon and submitted to the judgment of the court: 1st, the defendants were engaged in the mining of coal at the time the cause of action accrued in this case. 2d, the plaintiff worked for them as a miner in their mines to the amount of \$8.10 in April, 1884, and \$1.36 for the month of May, 1884, \$9.36. 3d, the defendants paid the plaintiff in goods the sum of \$17.98 during the time he was working for them. The legal question is as to the effect of the act of June 29, 1881, P. L. 147. There are two aspects in which the statute may be considered: First, in its effect upon the defendant's right of setoff independently of any agreement to that effect between the parties; second, in its effect upon the executed agreement of employer and employé for the payment of the latter's wages by the delivery and acceptance of commod-

ities of value other than lawful money. The terms of the case stated more particularly require a consideration of the statute in the second aspect above suggested. Payment of a debt by any other commodity than lawful money involves an agreement by the parties to deliver and accept such commodity in satisfaction of the debt. To constitute a cross demand a technical payment, an agreement to that effect must be proved. We therefore assume that the counsel had this principle in view when they used the term "paid" in the third statement of fact, and construe the same to mean that the goods mentioned were delivered and accepted in payment of the plaintiff's wages. Is the plaintiff entitled to recover, notwithstanding he has been paid in the way described? It is contended by his counsel that, under the act of 1881, a payment consisting of anything else than lawful money or the order described in that act is invalid. In construing this statute it is to be observed, in the first place, that its purpose was not to make it unlawful for persons, firms, and corporations engaged in mining and manufacturing to be at the same time interested in the sale of goods and merchandise to their employés. Whatever grievances may have been suffered by employés or the public on this account, they were not thought sufficient by the legislature to warrant prohibition of such dealings by law. On the contrary, the lawfulness of such sales at the same per cent. of profit charged to other cash customers is impliedly, but at the same time clearly, recognized in the 3d section of the act. It is unnecessary to inquire how far this general right is affected as to corporations by Section 6, Article XVI. of the constitution, or by the provisions of their charters and other acts. It is enough to say that, so far as private persons and firms are concerned, the act under consideration is the only legislation which affects the question, and, as we have seen, it only assumes to regulate the profits to be charged on such sales, not to prohibit them. We start out then with the unquestioned proposition that the debt of the employé for goods sold and delivered to him by his employer is as valid and binding in law and public policy as the debt of the employer for the wages of his employé. In the second place it is to be observed that the act of 1881 does not, in express terms, prohibit the payment of the wages of the employé by the

delivery and acceptance of goods. The only kind of payment made unlawful is by orders not redeemable in cash. On the contrary, in the third place, the right of the employé to use the debt due him for his labor in payment of his just debts is recognized, first, in the provision which requires the employer to "settle" with him monthly; second, in the express reservation of the right of the employé to assign his wages. Again, the provision for monthly payments in lawful money or cash order is for the benefit of the employé. It is a familiar principle of law that a person for whose benefit an act is passed may waive its provisions if no public policy is contravened thereby. As we have already suggested, there is nothing in the act to indicate that an acceptance of goods in payment of wages is contrary to the policy of the law. From these considerations we conclude, with the defendants' counsel, that the fair and reasonable construction of the act is, that the employé may decline to receive anything but cash or an order redeemable in cash in payment of his wages, but if he does receive goods in payment, he by doing so waives his right to demand cash. Having received payment once he is estopped from demanding it a second time. The opinion of Judge Ewing in *Kettering v. Imperial Coal Co.* 15 P. L. J., 359, cited by plaintiff's counsel, does not at all conflict with this conclusion. While deciding that the plaintiff was entitled to recover because the defense depended upon an order issued in violation of the penal section of the act, the learned judge at the same time said: "While the employé may demand, and is entitled to receive, lawful money of the United States in payment, yet he may accept bank notes or anything not made illegal by the act, and having received such payment it would be conclusive on him." This conclusion renders it unnecessary to consider the effect of the act upon the defalcation acts. We, therefore, feel constrained to leave that question open for future consideration.

We conclude that, upon the admitted facts, the defendants are entitled to judgment, and it is ordered, that unless exceptions are filed to this decision after due notice, judgment be entered in favor of the defendants upon payment of the legal fee therefor.

S. Jenkins, for plaintiff.

George W. Shonk, *contra*.

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FRIDAY, MARCH 26, 1886.

No. 65

Court of Common Pleas of Luzerne County.

NESBITT, ASSIGNEE, v. DODSON.

1. Where a debtor, with knowledge that his creditor—a bank—has made an assignment of all its assets for the benefit of creditors, buys up a claim against the assignor and seeks to use it as an offset for the full amount in an action brought by the assignee of the bank, the burden of proof that the assignor was solvent rests on the defendant.
2. In case of the solvency of the assignor, to avoid circuity of action, the offset will be allowed, otherwise not.

Exceptions to referee's report.

The opinion of the court was delivered January 4, 1886, by

RICE, P. J.—An assignment for the benefit of creditors does not extinguish a right of setoff which had attached at the time of the assignment, and in such a case it is immaterial whether the assignor is solvent or insolvent. But, as all concede, if the counter claim (as in this case) was acquired after the assignment, the right to use it as a setoff is dependent on the solvency of the assignor. This is so, not because the statute has made it the test, but because the parties have changed, and other rights have attached. The legal title to the note in suit has vested in the assignee, and, as the cross demand was not owned by the defendant at the time of the assignment, the title thus vested unaffected by any right of setoff, and the rights of the creditors to a due administration and distribution of the assets have intervened. They are prior in time, and the assignment being unimpeached, are *prima facie* superior to any right which the defendant may have to setoff a claim purchased by him with notice of the assignment. He stands in the shoes of the creditor whose claim he has bought. He may sue his debtor, the assignor, it is true, and recover a judgment for the full amount, but he cannot sue the assignee, and, as against the assets in the hands of the assignee, he is only entitled to equal distribution. If the assignor was solvent his claim

will be paid in full, but if not he will receive a *pro rata* share only "The statutes of setoff," says Mr. Justice Gibson, "are intended for cases where a discount may be made without confusion or inconvenience." *Wolfersberger v. Bucher*, 10 S. & R. 10. They have been liberally construed so as to permit the use of an assigned claim in order to avoid circuity of action. *Murray v. Williamson*, 3 Binn. 135. Upon the same principle, the claim owned by the defendant might be allowed as a setoff in the present action if the estate were solvent (*Skiles v. Houston*, 2 East. Rep. 571), but after a very diligent search no case has been found to sustain the right of setoff without proof of solvency of the assignor where the right did not exist at the time of the assignment. The text-books deny the right (see *Burrill on Assignment*, 538-555), and it is denied in the only decision which we have been able to find in this state meeting the precise question raised here. While not binding upon us, it is the decision of a very able judge, and is therefore entitled to respectful consideration. (See *Thomas v. Winpenny*, 13 W. N. C. 93). The question before us is, after all, narrowed down to one of evidence. Upon whom does the burden of proof rest? After as thorough examination of this question as we are able to make, we are led to the conclusion that, where a debtor with knowledge that his creditor—a bank—has made an assignment of all its assets for the benefit of creditors, buys up a claim against the assignor and seeks to use it as an offset for the full amount in an action brought by the assignee, the defendant should come prepared to establish his right so to use the claim by proof of the assignor's solvency. In that case, to avoid circuity of action, the offset should be allowed, otherwise not. As there was no such proof in the present case, the referee properly rejected the setoff.

The exceptions are overruled and the report of the referee is confirmed, and it is ordered that, upon payment of the legal fee, judgment be entered thereon in favor of the plaintiff for the sum of three hundred and six dollars and sixty-five cents, with interest from September 22, 1885, amount to be computed by the prothonotary.

George K. Powell, for plaintiff.

Q. A. Gates, for defendant.

Court of Common Pleas of Luzerne County.

GERRY v. SHERIDAN.

1. The release of the lien of an incumbrance, after the defendant's arrest on a *capias*, will not authorize an abatement of the writ upon the ground that he is a freeholder.
2. Possibly it would authorize his discharge on common bail.
3. A freeholder to be privileged from arrest must have an estate clear of incumbrance, and the court will not inquire if the estate is sufficient beyond the incumbrance to satisfy the demand.

Rule to show cause why capias should not be quashed.

The opinion of the court was delivered October 26, 1885, by

RICE, P. J.—We are asked to quash this writ upon two grounds: 1st, because the lien of the judgment upon the defendant's freehold has been released since the writ issued; 2d, because the defendant's freehold is worth more than the plaintiff's demand over and above the incumbrance.

I. Inasmuch as the same section which authorizes the court to abate a writ of *capias ad respondem* issued against a freeholder, also authorizes an allowance of thirty shillings costs to the defendant in the nature of a penalty, it is hardly to be supposed that the exercise of this power was intended to be authorized where the defendant was not exempt at the time of his arrest. It follows that the attempted release of the lien of the incumbrance since the defendant's arrest is no ground for quashing or abating the writ. True, the first section of the act (March 20, 1725, 1 Sm. L. 164, P. D. 63, pl. 47), provides that the freeholder shall not "be arrested or detained in prison." Possibly, therefore, if the release were well executed and made matter of record, and the defendant were still in custody, it might be ground for discharging him on common bail. But, as that question is not raised by the present rule, we need not decide it.

The second question is not entirely free from difficulty. The language of the second section of the act, and a remark of the court in *Fitler v. La Breure*, 1 S. & R. 363, would seem to be favorable to the view taken by the defendant's counsel. The weight of authority seems, however, to be the other way. In

Quesnel v. Mussi, 1 Dall. 436, it was held that a judgment before a justice of the peace was sufficient ground to defeat the privilege of a freeholder. In 1820 the Supreme Court decided that, if there is an incumbrance against the defendant's freehold, he is not privileged from arrest; the court will not go into the question of value. *Foy (or Toy) v. Simpson*, 2 Bright. Dig. 2050; 3 *Id.* 3653; 3 Am. L. Journ. 522. We have not seen the report of this case, but if it is correctly digested it is decisive. In *Hill v. Ramsey*, 2 M. 342, the District Court of Philadelphia held, that a freeholder to be privileged from arrest must have an estate clear of incumbrance, and the court will not inquire if the estate is sufficient beyond the incumbrance to satisfy the demand. In *Clippinger v. Creps*, 2 W. 48, the court, after quoting the provisions of the act under consideration, remarked: "Such estate must be a clear estate. It has always been held that an incumbrance to any amount takes from him the privilege of the exemption from arrest given him by the act referred to." So, also, in *Robinson v. Narber*, 15 Sm. 83, Sharswood, J., speaking of the same act said: "The value of the freehold there has no relation to the amount demanded." We conclude that both reasons for quashing the writ must be overruled.

The rule is discharged.

Court of Common Pleas of Luzerne County.

NOBLE v. SCRANTON GLASS COMPANY.

Certiorari.

The rule that where judgment of a justice is entered by default the hour must be stated does not apply where the record shows that the parties appeared at the hearing.

The opinion of the court was delivered November 16, 1885, by

RICE, P. J.—The rule that where judgment is entered by default the record should show the hour seems to be pretty firmly established. But the reason for this rule does not exist, where the record shows that the parties appeared at the hearing, and hence the rule itself should not be extended to such cases.

The exceptions are overruled and the judgment is affirmed.

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VOL. XIV.

FRIDAY, APRIL 2, 1886.

No. 66

Court of Common Pleas of Luzerne County.

BOSTON v. McDANIELS.

On the reversal of the judgment of a justice of the peace on *certiorari*, an execution cannot issue for costs.

Rule to strike off judgment and set aside execution.

The opinion of the court was delivered January 18, 1886, by

RICE, P. J.—It is well settled that, when the judgment of a justice is affirmed it becomes a judgment of the Common Pleas, and may be enforced by execution issuing therefrom. *Welker v. Welker*, 3 P. & W., 21; *Essler v. Johnson*, 1 C. 350. Where the *certiorari* is *non prossed* the record must be remitted to the justice to be proceeded in. *Welker v. Welker*, *supra*. But where the judgment is reversed the decisions are conflicting as to the right of the plaintiff in error to have execution for costs. The question has been brought before the Supreme Court in two reported cases, but in both they refused to decide it, because, as they held, the award of execution was as much a part of the judgment of reversal as the reversal itself, and the judgment of the Common Pleas, being final under the act of 1810, they could not review it on writ of error. *Silvergood v. Storrick*, 1 W. 532; *Palmer v. Laycock*, 42 Leg. Int., 278. In 1 T. & H. Pr. 901, it is stated that upon reversal an execution may issue at once for the costs, and it was so held in *Long v. Shelly*, 10 Phil. 506; and *Elton v. Stokes*, 15 Phil. 308. In the case of *Brown v. Boyle*, 2 Kulp, 50, the question was not directly before the court, but in the discussion of the case we followed the decision in *Long v. Shelly* without further examination. Later decisions of the

courts of Berks, Lackawanna, and Chester counties, in which, after a very thorough examination of the question, the contrary has been held, have compelled us to reconsider our former opinion. The cases to which we refer are *Hartman v. Bechtel*, 1 Wood. Dec. 140; *Pa. Anthr. Coal Co. v. Ranck*, 2 Ch. Co. Rep. 488; *Backus v. Foy*, *Ib.*; *Munshower, v. Evans*, *Ib.* 489; and see also *Brennan v. Taylor*, 2 W. N. C. 16. In the case of *Welker v. Welker*, *supra*, Gibson, C. J., said: "A *certiorari* to remove the judgment in an action before a justice of the peace has long been considered with us to be in substance a writ of error, as the remedy would be in form, were the justice the judge of a court of record." If this proposition be accepted, and the adjudicated cases relating to the subject of costs in error be followed, the conclusion is inevitable that on a simple reversal there can be no award of execution for costs. The parties are left where they began, the case not being provided for by any of the statutes which give costs. (See especially *Smith v. Sharp*, 5 W. 292; and also *Wright v. Small*, 5 Bin. 204; *Landis v. Shaeffer*, 4 S. & R. 199, *Cameron v. Paul*, 1 J. 277; *Beam v. Warfil*, 9 Lanc. Bar, 185). The act of 1810 contains nothing to affect the applicability of these decisions to the present case. It does, it is true, give the plaintiff a right to recover costs in certain cases, where a judgment has been reversed, but that right is not complete until after a second trial. "The right to costs in a proceeding reversed by *certiorari* depends upon the relative amount recovered or abated by the subsequent judgment." *Atkinson v. Crossland*, 4 W. 450. We agree that denying the defendant an execution for costs upon reversal of a judgment at his instance may frequently work apparent hardship. The answer to this is that the right to costs always depends upon some statute, and the hardship is no greater than in many other cases that might be mentioned where the law seems to be defective. For a more elaborate consideration of the question in all its phases we refer to the opinions of Judge Woodward, Judge Futhey, and Judge Archbald in the cases above cited.

The rule to set aside the execution is made absolute, and the judgment for costs is stricken off.

W. H. McCartney, for plaintiff in error.

Q. A. Gates, for defendant in error.

Court of Common Pleas of Wyoming County.

PIATT v. SICKLER *et al.**Practice—Default—Waiver.*

1. Judgment by default taken in violation of an act of assembly and rule of court will be stricken off.
2. Mere lapse of time after the entry of judgment, where it is not shown that the defendant knew of such entry, will not be considered a waiver of an irregularity in taking judgment.
3. Judgment by default must be taken in term time.

Rule to show cause why judgment shall not be stricken off, and fieri facias set aside at costs of plaintiff.

Judgment was entered against defendants on a warrant of attorney March 28, 1876. April 5, 1884, a writ of *scire facias* was issued thereon returnable April 25, 1884. The sheriff made return that he served the writ on the defendants on April 16, 1884. The next term was held in June. On May 3, 1884, the defendants not having appeared, judgment was entered against them in vacation on a *præcipe* signed by the attorney for the plaintiff, which directed the prothonotary to enter judgment for want of an appearance. Nothing further was done until June 25, 1885, when an execution was issued. Thereupon defendants made an affidavit that judgment had been improvidently taken against them, and obtained this rule. The rule of court governing such cases provides that if the defendant does not appear in ten days after service of the writ, the prothonotary may enter judgment on or after the first day of the next succeeding term.

The opinion of the court was delivered January 11, 1886, by

SITTSE, P. J.—This proceeding is founded upon a *scire facias* issued upon judgment No. 341, April term, 1876. The *scire facias* issued on April 5, 1884. It was served on the defendants on April 16, 1884. It was made returnable on the second return day of the term, viz., April 25, 1884. The defendants did not appear. The *scire facias* had not been served ten days before the return

day, and judgment could not be taken on that day. On May 3, 1884, judgment was entered by the prothonotary in vacation on the præcipe of attorneys for plaintiff for want of an appearance. A *fiery facias* was issued returnable to August term, 1885, and thereupon the defendants asked to have the judgment stricken off as having been irregularly entered. It is clear that this judgment was irregularly entered. A statute which authorizes the entry of a judgment in term time does not authorize one to be entered in vacation. Act of June 13, 1836, 1 Purd. 59, pl. 17. A rule of court which authorizes the prothonotary to enter judgment for want of an appearance after the first day of the next succeeding term cannot be used to justify the entry of judgment before that time. Court Rules, p. 79, sec. 4. It is contended that by permitting the lapse of one year and two months between the entry of judgment and any attempt to strike it off, the defendants have waived the irregularity. A judgment irregularly taken as this was, is said to be voidable, not void. The defendant may ratify it, may be estopped by his conduct from disputing it, by giving bail for stay of execution, by delay after knowledge of its entry in taking steps to set it aside. *Kohler v. Luckenbaugh*, 3 Norris, 261. In this case there is no proof that the defendants knew of the entry of the irregular judgment before the *fiery facias* was issued, and they moved promptly after it was issued. From the fact that the *scire facias* was served upon them and that they took no notice of it, they had a right to assume that a judgment might be entered against them. They knew that all legal steps were liable to be taken against them. But they could not assume that an irregular judgment would be entered. They could not know that a judgment not warranted by the statute and the rules of court would be taken. Upon what ground can we say that the defendants have waived their right to object to this judgment? They have done no act to mislead the plaintiff. They simply did not appear. The statute and the rules of court point out what may be done in such case. This has not been done, and the judgment must be stricken off.

Rule made absolute.

Terry & Streeter, for rule.

W. E. & C. A. Little, *contra*.

THE LUZERNE LEGAL REGISTER.

VOL. XIV.

FRIDAY, APRIL 9, 1886.

No. 67

Court of Common Pleas of Luzerne County.

MCMONEGAL, ASSIGNEE, *vs.* FEATHERSTON.

1. As a general rule a married woman's confession of judgment is absolutely void, and this applies to a confession of judgment in an amicable action of ejectment to which the husband is not a party.
2. A husband has a right to appear in any judicial proceeding to defend his wife's interests.
3. A decree is not essential to the enjoyment by a married woman of the privileges conferred by the *feme sole* trader acts of 1718 and 1855.
4. IT SEEMS that a married woman who, by reason of the desertion or drunkenness and neglect of her husband is entitled to the benefits of those acts, may confess a judgment in ejectment in favor of the vendor for land held by her under contract, without the joinder of her husband.

Rule to strike off judgment.

The opinion of the court was delivered March 29, 1886, by

RICE, P. J.—On April 3, 1883, E. Troxell entered into a written contract with Ann Featherston, wife of Michael Featherston, to sell her the premises in dispute for four hundred and fifty dollars, payable in installments. It was agreed therein that the vendee should enter into an amicable action of ejectment with confession of judgment in favor of the vendor, and that upon failure to pay any installment, of which an affidavit should be sufficient evidence, a writ of *habere facias possessionem* might be issued. The contract was signed by the defendant and her husband, but the amicable action of ejectment was not then entered into. After the erection of a dwelling house upon the premises the defendant and her husband went into the occupancy thereof as a family residence. In June, 1885, Mrs. Featherston left her husband, as she testifies, on account of his drunkenness and cruel treatment. Since the separation the premises have been occupied by Michael

Featherston. Payments of purchase money were made to Mr. Troxell as follows: April 3, 1883, \$50; March 4, 1884, \$120; April 3, 1885, \$50. On July 29, 1885, Condy McMonegal, the father of Ann Featherston, paid Mr. Troxell the balance of purchase money and took an assignment of his interest in the land, the latter agreeing to make Mr. McMonegal a good and sufficient deed for the same, subject to the rights of Ann Featherston under the contract. Immediately afterwards, Ann Featherston entered into an amicable action of ejectment for the land, and confessed judgment therein to Condy McMonegal. This was filed August 1, 1885, together with an affidavit of Mr. McMonegal that default had been made in the payment of \$72.40 of purchase money due April 3, 1885, and thereupon a writ of *habere facias* was issued. Before the same was executed Michael Featherston applied for and obtained the present rule. The amicable action of ejectment and confession of judgment were executed without the knowledge and assent of Michael Featherston, except as they are to be implied from his signing of the original contract. The installment of principal and interest due April 3, 1885, amounted to about \$120. According to the testimony of Michael Featherston, the \$50 paid on that day was accepted by Mr. Troxell with the express understanding that he would wait until the next payment became due (April 3, 1886,) for the balance. Mr. Troxell does not contradict this statement. Passing for the present the disputed questions of fact whether the above stated payments of purchase money were made, and the improvements were paid for, by Michael Featherston or by his wife, let us assume that she held the equitable title to the land in her own right and free from any trust in favor of her husband. Two questions of law then present themselves. First, has her confession of judgment any force or validity? Second, can her husband interfere to question its validity?

I. The fact that Mrs. Featherston might have been sued and judgment obtained against her for the land does not make the case an exception to the general common law rule that a judgment confessed by a married woman is void. For example, the judgment bond of a married woman is void, though given for debts contracted before marriage, or for the improvement of her

separate estate, or for necessities for the support and maintenance of the family. Here the defendant had an equitable estate in the land which—assuming her to be under the disabilities of coverture—she could not assign or transfer, except by deed duly acknowledged, her husband joining therein. If she had undertaken to assign her interest to Condry McMonegal by deed without the joinder of her husband, there would be ample authority for declaring it void. Neither would it estop her from asserting just what is asserted here, namely, that the vendor's right to forfeit the contract had been waived by an agreement to extend the time of payment. This being so, the law prescribing the conditions for the alienation of a married woman's estate in lands would be entitled to very little respect if it permitted her to do indirectly by a voluntary confession of judgment in ejectment what she could not do directly by her solemn deed. But, it is argued, the confession of judgment is good against the wife because it was part of the original contract that it should be given by her. Assume this to be so, it would not follow that the plaintiff could have execution thereof at this time, there being evidence that the time of payment had been extended. But we feel compelled to go still further and to hold that the stipulation contained in the original agreement does not affect the question. True, an exception to the general rule of the common law is made in favor of a confession of judgment for purchase money of land. "The exception was first declared in *Patterson v. Robinson*, 1 C. 81, and it was re-asserted in *Ramberger v. Ingraham*, 2 Wr. 147. The ground upon which it was rested seems to have been that, to avoid injustice, a conveyance to a feme covert and her confession of judgment for the purchase money are, taken together, a substantial conveyance upon condition of payment of the price, and, therefore, she will not be allowed to retain both the price and the land." *Brunner's Appeal*, 11 Wr. 67. How steadily the courts of this state have resisted the attempts to engraft other exceptions upon the common law rule and to extend the recognized exception so as to include equally meritorious cases is shown in *Vandyke v. Wells*, 7 Out. 49, and the cases there collected. Indeed, the later cases show a tendency towards the rule that, even in the case of a judgment bond or

note for purchase money, it must constitute one and the same transaction with the purchase. "It does not follow," say the court, "that an obligation given by a married woman long after a purchase of real estate and for a sum that she may owe thereon is of like validity." *Prinkey v. Murray*, 15 W. N. C. 391; *Christner v. Hochstetler*, 16 W. N. C. 368. This remark may be made here with much greater force. The vendor had seen fit to deliver the contract, give the defendant possession of the premises, and receive the down payment without insisting on the execution of a confession of judgment in his favor. More than two years had been allowed to elapse, and in the meantime a considerable portion of the purchase money had been paid and valuable improvements had been made. If an action of ejectment had been brought by the holder of the legal title, no court, on this evidence, would have given him an unconditional judgment for the land. The validity of the defendant's confession of judgment is to be determined by the state of facts existing at the time of its execution. She was then under no legal obligation to surrender her title or possession. She could not have been compelled to do so, either in law or equity. The confession, therefore, notwithstanding the executory agreement therefor, was purely voluntary, and cannot be sustained upon the ground that it was no more than the law would have compelled. Neither is it sustainable upon the principle that it would be unjust and inequitable for her to hold the land without giving the vendor the means of summarily ejecting her. In short, we cannot regard this confession otherwise than as an attempt on the part of the defendant to divest her title to the land without the consent of her husband, and in a way not prescribed by the statute. It was, therefore, void, unless circumstances existed which entitled her to deal with the property as a *feme sole*. We shall refer to this hereafter.

II. As to the second question we do not think there can be much doubt. In all actions affecting the real estate of a married woman the husband is a necessary and proper party. It is not competent for the plaintiff to say that Michael Featherston cannot interfere because he is not a party. The answer to that objection is, that if the defendant was under the disabilities of cov-

verture her husband should have been made a party. The act of 1848 has not affected the common law right of the husband to appear in any judicial proceeding to defend his wife's interests. "We are clear," says Black, J., "that in any case where a married woman has a right to be heard, her husband may be heard in her place. What she may do in any judicial proceeding he may do for her without a power of attorney." *Morris v. Garrison*, 3 C. 226; *Meckley's Estate*, 8 H. 478.

III. Thus far we have considered the case as if Ann Featherston, at the time this judgment was confessed, was under all the disabilities of coverture. But, it may be urged, there is some evidence that she was entitled to the privileges conferred by the *feme sole* trader statutes. The decisions are numerous to the effect that a decree is not indispensable to the enjoyment of the privileges conferred by the acts of 1718 and 1855. All that is necessary is proof of the facts. If the facts which were necessary to entitle the defendant to the privileges conferred by those statutes existed in this case, then she might have been sued alone (*Burke v. Winkle*, 2 S. & R. 189; *Orrell v. Van Gorder*, 15 Nor. 180), much more, she could have executed a deed for her interest to a stranger, or a surrender of her title to the owner of the legal estate without the joinder of her husband. *Black v. Tricker*, 9 Sm. 13; *Elsey v. McDaniel*, 14 Nor. 472; *Foreman v. Hosler*, 13 Nor. 418. "The act of 1855 is so plain, positive, and unambiguous in its terms that no one need for one moment hesitate concerning its design and intention. It secures to the deserted wife, not merely the rights and privileges of a *feme sole* trader under the act of 1718, but it also confers upon her the absolute and unqualified right to dispose of her own property, real and personal, as to her may seem meet." *Moniger v. Ritner*, 14 W. N. C. 99. "It is a remedial statute and is to be benignly interpreted." *Black v. Tricher*, *supra*. We see no good reason why the same facts that would make her separate deed valid should not sustain the surrender of her right to possession under her equitable title, by a confession of judgment in ejectment in favor of the owner of the legal title. But Michael Featherston is in possession claiming title in his own right, and denying the existence of those facts which alone would sustain the wife's confession of judgment. It would be manifestly unjust to permit him to be ejected by proceedings on this judgment with-

out giving him a day in court. Neither do we think the evidence as to her being entitled to the privileges of the *feme sole* trader acts so clear and free from doubt as to make a jury trial unnecessary. How can these disputed questions of fact be determined and the rights of all parties be protected in the meantime? After careful consideration we conclude that these ends can be accomplished by the following order. The admission of the husband to defend is justified by the authorities. (See *Johnston v. Fullerton*, 8 Wr. 466).

Michael Featherston is permitted to appear and plead in the present action, and the rule to strike off judgment against Ann Featherston is directed to stand over, and execution is stayed until after the trial of the issue. If, however, the said Michael Featherston does not appear and plead within ten days, then it is ordered that this rule be discharged.

S. J. Strauss and J. T. Lenahan, for plaintiff.

D. L. O'Neill and A. Ricketts, for Michael Featherston.

Court of Common Pleas of Luzerne County.

SCHILKI *et al* v. MOYER.

A summons from a justice need not be served on an "adult" member of the family.

The opinion of the court was delivered April 5, 1886, by

WOODWARD, J.—While, under the depositions, this would seem to be a case of some hardship; we feel bound to hold that the exceptions cannot be sustained. Two parties were sued, but only one of them was served with process. The language of the justice in entering judgment against "the defendant," can possibly mean nothing else than that judgment was rendered against the party served. The second exception is based on a misapprehension of the law. A summons from a justice need not be served on an "adult" member of the family. The language of the act of March 20, 1810, Pur. 981, pl. 43, is this, "or leaving a copy of it (the summons) at his dwelling house in the presence of one or more of his family."

The proceedings are affirmed.

G. M. Harding and John McGahren, for plaintiff.

George H. Troutman, for defendant.

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THIS issue closes Vol. XIV. The indexes to Vols. XIII. and XIV. are in the hands of the printer and will be issued to our subscribers in a few weeks. We would advise our readers to look over their numbers (the price of each number being ten cents) and if any are missing to notify us at once so that we can supply them.

Court of Common Pleas of Luzerne County.

FERREN *et ux.* v. PERRY *et al.*

Mechanic's Lien.

1. Laborers employed by a sub-contractor cannot file a lien.
2. A lien will not be stricken off upon proof *dehors* the record that the person named in the claim as the contractor was not such.
3. Where the contract was with a person, not the owner, the claim must show with reasonable certainty that he bore to the owner the relation of contractor, architect or builder.
4. The language of the claim was: "The person with whom said claimants contracted is William Cool. The amount claimed to be due is forty dollars," etc.—*Held*, that the lien was defective on its face, because it did not aver that William Cool was the contractor, architect or builder.

Rule to show cause why mechanic's lien should not be stricken from the record.

The opinion of the court was delivered November 16, 1885, by

RICE, P. J.—The evidence taken upon this rule shows that the contract for building the structure described in this lien was let to Lemuel Garrison; that he sub-contracted with William Cool to dig the cellar at a certain price per cubic yard; that Charles Ferren, the claimant, was not employed by the owners of the building, nor by Mr. Garrison, the contractor, but worked by the day for William Cool, who has been paid in full. If we could

act upon this evidence at this time there would be no doubt as to our duty. Laborers employed by a sub-contractor are not entitled to file a mechanic's lien. *Harlan v. Rand*, 3 C. 511; *Hill v. Newman*, 2 Wr. 151; *Smith v. Stokes*, 10 W. N. C. 6. It is held, however, that where the lien is regular on its face the court will not strike it off in this summary way upon proof *dehors* the record that the person named in the claim as the contractor was not such. *Maxfield v. Germ. Luth. Church*, 2 Luz. Leg. Reg. 120. Therefore, in disposing of the present rule our examination will be confined to the claim as filed. Every claim must set forth, *inter alia*, the names of the owner or reputed owner of the building, and also of the contractor, architect or builder, where the contract of the claimant was made with such contractor, architect or builder. Act of June 16, 1836, sec. 11, P. L. 698. These are essentials to a valid lien. (See *Barclay's Appeal*, 11 W. N. C. 359; *Steinman v. Miller*, 12 W. N. C. 244; *McCay's Appeal*, 1 Wr. 125). To say nothing of the clerical omission to set forth the names of the owners of the building, we think the claim is fatally defective on its face in that it does not set forth the name of the contractor, architect or builder. The language of the claim is as follows: "The person with whom said claimants contracted is William Cool. The amount or sum claimed to be due is forty dollars, for excavating and removing earth from the cellar of said building, under contract made with the said William Cool to do said work for and about the erection and construction of the hereinafter described building." Thus it is apparent that the claimants were not employed by the owners, and therefore it was essential to set forth the name of the contractor, architect or builder who did employ him. But, for aught the record shows, William Cool may have been a mere sub-contractor, or a workman, or even an entire stranger to the owners. It was not enough to aver that the claimants contracted with him; it was essential to make it appear with reasonable certainty that he bore to the owners the relation of contractor, architect or builder. If he did not bear that relation, then the law did not authorize him to bind the building by contracts with his laborers. (See *Duff v. Hoffman*, 13 Sm. 191-4; *Harlan v. Rand*, *supra*.)

The rule is made absolute.

Court of Common Pleas of Luzerne County.

MILLER *et al.* v. LOWENSTEIN.*Certiorari.*

In an action before a justice of the peace to recover back taxes paid to a collector under threat of distress, the statement of the plaintiff's demand ought to be so certain and definite as to show a legal cause of action within the jurisdiction of the justice, without the necessity of resorting to presumptions.

The opinion of the court was delivered September 3, 1883, by

RICE, P. J.—The demand upon which the alderman entered judgment for the plaintiff below is thus stated in the transcript: "Plaintiff claims two dollars and two cents, money paid to the defendants under threat that they, the defendants, as tax collectors, would levy and sell plaintiff's property, said two dollars and two cents, or any part thereof, not being due to said defendant by plaintiff." Within the statutory limits as to the amount of the demand the jurisdiction of justices of the peace extends to "all causes of action arising from contract either express or implied." It is claimed by the defendant in error that this was a case of involuntary payment of an illegal and unfounded demand, from which a contract to refund the money was implied. But we are not informed by the record whether the money paid to the plaintiffs in error was claimed by them as taxes, or as a common debt due to them as individuals. In this respect the record is materially defective, for the reason that it is left to presumption to decide whether the demand of the plaintiff below constituted a legal cause of action. A threat to distrain his goods for a demand of the plaintiffs in error as individuals would be a legally harmless threat, and would not constitute that compulsion which is essential as a foundation for an implied contract to repay. If it be assumed that the money was demanded and paid as taxes, it does not necessarily follow that the threat by the plaintiffs in error to proceed by distress was illegal or unwarranted merely from the fact that they were not due from the defendant in error personally. He may not have owed the taxes and yet his goods, under certain circumstances, might have been liable to levy and sale therefor. So, also, it seems to be clear that taxes illegally

assessed cannot be recovered back *from the collector*, who acts in good faith, although they were paid under a threat by the latter to resort to the summary method of levy and sale of goods for their collection. We do not mean to decide that an action to recover back money paid to a collector to relieve goods from an impending or threatened distress cannot be maintained in any case. In case a collector should enforce payment of the same tax a second time, a fair illustration would seem to be furnished where the right of action ought to be sustained. Probably other illustrations could be given, and possibly this is such a case. But in actions of this kind before justices of the peace, the statement of the plaintiff's demand ought to be so certain and definite as to show a legal cause of action within their jurisdiction, without the necessity of resorting to presumptions.

The judgment and proceedings are reversed and set aside.

Court of Common Pleas of Luzerne County.

PHILLIPS v. DRYFOOS.

An affidavit of defense the averments of which are made upon "information and belief" simply without any allegation that such averments will be sustained by proof, is defective and insufficient

Rule for judgment for defective affidavit, etc.

The opinion of the court was delivered April 5, 1886, by

WOODWARD, J.—The declaration in this case charges that the note sued upon was payable to the order of the plaintiff, and that, at the time of its loss, it was not endorsed by the plaintiff, that it was overdue, and had never been transferred in any manner to a third party. Under such circumstances, if proven, the plaintiff would be entitled to recover upon the note without giving indemnity. *Bigler v. Keeler*, 8 W. N. C. 324; *Story on Prom. Notes*, 451. The affidavit of defense alleges no defense upon the merits, and the averments as to the transfer of the note, are upon "information and belief," without any allegation that he expects to be able to sustain such averments by proof. Such an affidavit is insufficient. 39 Penn. 64; 56 Penn. 33; 79 Penn. 384; 10 W. N. C. 188. *Rule* absolute.